

THE CONSTITUTIONAL PROTECTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS IN ZAMBIA:
AN HISTORICAL AND COMPARATIVE STUDY

by

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A Thesis presented for the Internal Degree of Doctor of
Philosophy in the Faculty of Laws of the University of
London, School of Oriental and African Studies.

June 1979



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ABSTRACT

This study examines the legal bases for the protection of human rights in the constitutional development of Zambia, and indicates how they have operated in practice. The approach adopted in discussing this subject is comparative in that the Zambian experiences and events are related to those that have taken place in other Commonwealth African countries, or indeed in any common law jurisdiction.

The work is divided into four parts and consists of ten chapters.

The idea that there must be some limits to the power of the state to interfere with man's rights is not new. Chapter One in Part I therefore traces the evolution of the idea of human rights as rooted in the theories of "natural law" and "natural rights". It also examines the influence and impact of international law on the development and spread of human rights throughout the world, not least in Africa.

The doctrine of "inalienable" human rights was borrowed by Africa from Europe and from America. Chapter Two discusses this theme and unfolds the avenues through which this doctrine found its way into the many independence constitutions of Africa. Chapter Three, on the other hand, examines the legal mechanisms through which human rights were protected and invaded during the colonial era before independence. The decision finally to incorporate a bill of rights in the self-government of Northern Rhodesia (now Zambia) was, as elsewhere in Africa, precipitated by certain active political, economic and social issues. Chapter Four discusses these.

Part II opens with Chapter Five which examines the content and salient features of the Zambian Bill of Rights. Chapter Six examines the role played by the courts in the enforcement of the guaranteed rights. The nature of the conflict between the overriding needs of socio-economic development in an emergent state and the protection of property rights are analysed in Chapter Seven.

In Part III, the question whether a one-party state constitutes a threat to human rights, and to democracy and to constitutionalism is discussed in Chapters Eight and Nine.

Part IV concludes the work with Chapter Ten appraising the problems affecting the constitutional protection of human rights in Africa, and suggests some alternative modes for their protection.

ACKNOWLEDGEMENTS

I would like to record my special gratitude and thanks to my supervisor, Professor J.S. Read, Professor of Comparative Public Law with special reference to Africa of the University of London, School of Oriental and African Studies, under whom I was fortunate enough to undertake this study, and from whose experience as a teacher of African constitutional law I derived enormous benefit. Professor Read's critique and guidance of this thesis in all its stages proved to be particularly helpful in the efforts he kindly made in drawing my attention to some interesting aspects of my work with which I could not otherwise have dealt. Indeed, his uninhibited enthusiasm and his continual interest in my research have been a spur to the completion of this work.

My special indebtedness must also go to the members of the staff of the Institute of Advanced Legal Studies, not only for the excellent services which they render to all research students, but also for providing me with a carrel from which I wrote a greater part of this thesis. I would also like to thank the Librarians and members of the staff of the libraries of the School of Oriental and African Studies, The Royal Commonwealth Institute, the Foreign Office, the Public Records Office, the University of Zambia, and the High Court for Zambia; the Keeper and staff of the Zambian National Archives, the Zambia High Commission Office, London, and the Research Bureau of the United National Independence Party (UNIP) in Lusaka.

I must also take this opportunity to express my thanks to Mr. Justice Annel Silungwe, the Chief Justice for Zambia, for the discussions he willingly agreed to have with me about aspects of my work, and for

answering my questions on the Constitution of Zambia. Likewise, I should also like to thank those lawyers of the Zambian Bar who kindly gave their previous time to attend to my enquiries, and commented about certain aspects of Zambia's constitutional provisions relating to human rights.

My list of those who rendered valuable assistance to me would be incomplete if I did not mention the role played by my fellow colleagues and members of the staff of the School of Law, University of Zambia - Mr. Joshua Kanganja, Mr. John Mulwila, and Mr. Remmy Mushota. Through discussions they willingly had with me on many aspects of my work, and through their kind gesture of allowing me to look at some of their materials in the form of cases, official reports, etc., they indeed lightened my task.

My work also owes its enrichment to the work of many writers, commentators, etc., on African political and constitutional affairs, and on Zambian history and anthropological studies. I should like to pay my tribute to the work so ably done by these writers/commentators in every area that this study has been able to touch on.

I should also like to express my gratitude to Miss Janet Marks for her typing of this thesis, and for the interest she developed in my work. Also for the trouble she took to put my footnotes in order.

However, I should like to make a final remark here, namely that whatever assistance I have derived from the above mentioned aides and well-wishers, the shortcomings of this work are naturally mine.

Lawrence Silas Zimba, LL.B., LL.M(Zambia)

ABBREVIATIONS

A.C.	Appeal cases (House of Lords and Privy Council, U.K.)
A.G.	Attorney-General
A.J.I.L.	American Journal of International Law
A.L.R.(S.L.)	African Law Journal (Sierra Leone)
ALL E.R.	All-England Reports
ALL N.R.	All-Nigerian Reports
B.S.A. Co.	British South Africa Company
B.Y.I.L.	British Year of International Law
Cap.	Chapter (Zambia)
C.L.P.	Current Legal Problems
Cmd	Command Paper
C.O.	Colonial Office
Cols.	Columns
CPP	Convention People's Party (Ghana)
D.P.P.	Director of Public Prosecutions
E.A.J.	East Africa Journal
E.A.L.J.	East African Law Journal
E.A.L.R.	East African Law Reports
F.O.	Foreign Office
G.L.R.	Ghana Law Reports
G.N.	Government Notice
H.C.	House of Commons
H.C. Deb.	House of Commons Debates (UK)
H.L. Deb.	House of Lords Debates
HM	His/Her Majesty

I.C.L.Q.	International and Comparative Law Quarterly
J.A.L.	Journal of African Law
J.A.S.	Journal of African Society
J.M.A.S.	Journal of Modern African Studies
KANU	Kenya African National Union
K.B.	King's Bench (Reports)
KADU	Kenya African Democratic Union
KPU	Kenya People's Union
L.C.	Legislative Council
Leg.Ass.Deb.	Legislative Assembly Debates
Leg.Co.Deb.	Legislative Council Debates
L.R.N.R.	Law Reports of Northern Rhodesia
M.L.R.	Malaya Law Review
M.L.R.	Modern Law Review
Nat.Ass.Deb.	National Assembly Debates
N.E.R.	North-Eastern Rhodesia
N.L.R.	Nigeria Law Reports
N.R.	Northern Rhodesia
N.R.L.R.	Northern Rhodesia Law Reports
N.R.L.R.	Northern Region Law Reports (NIGERIA)
N.W.R.	North-Western Rhodesia
P.C.I.J.	Permanent Court of International Justice
Q.B.	Queen's Bench (Division)
R. & N.	Rhodesia and Nyasaland
R. & N.L.R.	Rhodesia and Nyasaland Law Reports
S.I.	Statutory Instruments
S.J.R.	Selected Judgment of Rhodesia
TANU	Tanganyika African National Union

T.L.R.	Times Law Reports
UFP	United Federal Party
UK	United Kingdom
UNIP	United National Independence Party (Zambia)
UP	United Party (Zambia)
UPP	United Progressive Party (Zambia)
W.L.R.	Weekly Law Reports (UK)
V.R.U.	Verfassung und Recht im ubersee
Z.L.J.	Zambia Law Journal
Z.L.R.	Zambia Law Reports

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PART I

AN HISTORICAL BACKGROUND TO THE LEGAL
PROTECTION OF HUMAN RIGHTS IN COMMONWEALTH AFRICA

CHAPTER 1

HISTORICAL ORIGINS AND DEVELOPMENT OF THE CONCEPT OF HUMAN RIGHTS

A. INTRODUCTION

The topic of the constitutional protection of human rights in this inquiry is primarily discussed in the light of the experiences derived from Zambia.

The Republic of Zambia (formerly the British Protectorate of Northern Rhodesia) came into existence in 1964, when independence was granted to the territory by Britain. Zambia was the first country in the Commonwealth to attain a republican status at independence. The country lies in the interior of Central Africa, and shares borders to the north with Zaire and Tanzania, to the east with Malawi and Mozambique, to the south with Rhodesia and Namibia (South-West Africa), and to the west with Angola. It lies between latitude 8° and 18° south of the Equator and longitude 22° and 34° east.

According to the 1976 estimates,¹ 5,138,000 people occupy some 290,586 square miles. Seventy per cent of these live in rural areas where they pursue a traditional mode of agricultural cultivation, and the remaining one-third live in urban centres along the line of rail. Zambia is a multi-racial society, with around 50,000 Europeans and 13,000 Asians. These form the main minority groups. All these minorities live overwhelmingly in town exercising a considerable, albeit declining influence in business, commerce, and the civil service.

Lusaka, with a total population of 401,000, is the capital. The other principal towns include Kitwe, Ndola, Chingola, Mufulira, Luanshya, Kabwe and Livingstone.

Also, as a result of prolonged missionary activity, most Africans and whites are Christians. Asians are mostly Hindus or Muslims. The main Christian denominations include Anglicans, Roman Catholics, Seventh Day Adventists, Salvation Army, Methodists Episcopal, and the controversial² Watch Tower Jehovah's Witnesses and the Lenshinas (followers of the Lumpa Church led by "prophetess" Alice Lenshina).

The African community in Zambia, like most African communities elsewhere in Africa south of the Sahara, is not homogeneous, being made up of a number of ethnic groupings - popularly known as "tribes". Up to seventy-two of such groupings are distinguishable - with about an equivalent number of "dialectics". Even so, English is the official language for administrative and business purposes. There are at least four main local languages, viz., Bemba, Nyanja, Tonga and Lozi.

In terms of the constitutional history of Zambia, a bill of rights was first written in the country's self-government constitution of 1963. The Independence Constitution of 1964 retained the bill of rights, and so did the current One-Party Constitution (effective on 13th December 1973). The bill of rights which was first introduced in Zambia in 1963 was copied from the Nigerian Bill of Rights of 1960, which in turn traced its origins directly to the European Convention of Fundamental Rights and Freedoms, 1950. The European Convention was itself inspired by the Universal Declaration of Human Rights (1948). But the origins of human rights go much further in European history than is sometimes imagined.

B. Human Rights in World History

If there is any demonstrably valid truth about the concept of "human rights", it is that in order to understand its present-day characteristics and its justification from the constitutional theory point of view, one should, perhaps, have recourse to its history in order to show how the concept has persistently developed under different social and political conditions, and how these have determined its content and pattern of development. Unlike many legal concepts in the common law sphere, the idea of "human rights", known as "natural rights" in its historical times, has its ancestry stretching far back to the ancient regimes of the West, and has developed as an aspect of Western political philosophies. To this end the notion of "human rights". even in its present-day manifestation, owes much of its background to "the Judeo-Greco-Roman-Christian traditions"³ which have also undoubtedly shaped various facets of the European model of constitutionalism. In this chapter what we have tried to do is to present a bare outline of the early development of the idea of human rights in Western Europe and America up until the adoption of the Universal Declaration of Human Rights by the United Nations in 1948, and also moving from there to the proclamation of the European Convention on Fundamental Rights and Freedoms (and its five protocols) in 1950. We discuss the impact which the Universal Declaration made in arousing the human rights consciousness among the peoples of the Third World, in the Indian sub-continent and in Africa, and how this fact alone constituted a driving force in forging the movements of nationalism in the Third World areas. In the second place we indicate the role played by the European

Convention in the spread of human rights in many of the Commonwealth African independence constitutions in the later part of the 1950's and in the early 1960's.

It will thus be noted that these two documents are of special relevance to any discussion of human rights within the context of any African Commonwealth country with a bill of rights, or which has had one. The relevance of the documents lies in the fact that it is from these that the rights and freedoms enshrined in the constitutions of newly independent states were derived. But, as will be shown in due course, the rights and freedoms which found their way into the Universal Declaration, and later on into the European Convention, were themselves a restatement of the classical natural rights which had been achieved in England, America and France, and which had already been apparent in the early Greek city-states, and in the Roman and medieval Christian times - confirming our point here that the concept of human rights displays a characteristic continuity in its development from times of antiquity.

i) The substance of the concept of "natural rights"

Both in its historical manifestation and in its present-day implications, the idea of "natural rights" or human rights concerns itself with the problem of defining the relationship between the individual and the community. It concerns itself with the notion that the individual in the total scheme of the political community must be guarded against the arbitrary or oppressive conduct of those exercising power, or against the abuses of power. Professor Lauterpacht who notes, as asserted above, that the content of

human rights both in its historical and present perspective has always remained essentially the same, neatly summarizes the definition of the concept:

"The substance of natural rights has been the denial of the absoluteness of the State and of its unconditional claim to obedience; the assertion of the value and of the freedom of the individual as against the State; the view that the power of the State and of its rulers is derived ultimately from the assent of those who compose the political community; and the insistence that there are limits to the power of the State to interfere with man's rights to do what he conceives to be his duty".⁴

But although this is an accurate definition of "natural rights", a distinction can be drawn between the nature of the restrictions imposed upon those in power in ancient regimes and those in power in modern governments. In ancient times the restrictions thrown upon rulers meant, at most, only moral prohibitions, and were therefore in no way "legally" enforceable individual rights of the subjects.⁵ It is only in the course of historical times, more specifically after the victory of the theory of "legal positivism", that those rights were transformed into statutory law.

One further preliminary point ought to be stated here, and this is that the theory of "natural rights" of man directly developed from the doctrine of natural law - or, as Sir Norman Anderson put it, that "it was the doctrine of natural law which was the direct progenitor of the concept of human rights".⁶ According to Hugo Grotius (1583-1645), who is considered to be the founder of the modern theory of natural law, the doctrine of a Law of Nature could still be "viable and convincing", even if there were no God, or if the affairs of men were no concern to him".⁷ As a result of the popularization of this view by those

who followed Grotius, the whole concept of natural law underwent a change from an emphasis on natural law insistence on natural rights; that is, "from an appeal to a divine law which man, as a rational creature, could in part discern and apply to a proclamation of the inherent and sacred rights of man".⁸ And "human rights" is but the present-day name for what has traditionally been known as "natural rights".

There is also a further important difference between the contemporary movements for human rights and the earlier tradition of the "natural and inalienable rights of man". The earlier tradition of natural rights was primarily a system of protection of individual citizens against the tyranny of an absolute monarch or a despot. On the other hand, the contemporary scheme of human rights is a system of protection against the majority who happen to rule and who therefore wield the executive and legislative power of the state.

What then are the major evolutionary phases of the idea of natural rights? A useful starting point in our survey of the evolution of the twin ideas of "natural law" and "natural rights" is with the early ideologies of the Greek city-state, the polis, noting from there how the natural law traditions survived through early Roman times into early Christian times, and finally how the concept was received in feudal Europe (especially in England and France), and how the newly founded colonies of America benefited politically from the natural rights theories. It is at this point in time that natural rights were transformed into statutory law and later became to

be accepted as norms of international law with the solemn United Nations' Declaration of Human Rights in 1948.

ii) The role of Ancient Greece

Early Greek law and religion recognized two types of laws, viz., the law of "God" and the law of the "State". The early Greeks believed in the existence of a series of gods exercising authority in many facets of the citizens' life. They also believed that the commands emanating from these gods stood above those exercised by secular rulers. From this a distinction was made between the "higher norms of the divine power", that is the rules making up what we call "natural law", and the commands of the State which, if they are found at variance with the former, need not be observed because they are of a type inferior or subordinate to the "unwritten laws of heaven".⁹ In this sense the Greek theory of natural law restricted the area of secular authority and activity by requiring conformity to a norm postulated to exist at a higher level. This in a sense could be looked upon as an early manifestation of the concept of "constitutionalism" since in essence it claimed limitation of arbitrariness of state power as against individuals or the citizenry at large.¹⁰

In the second place it is a well known fact in political philosophy and jurisprudence that democracy first developed and was practised by the Ancient Greeks. The notions of "equality" and "justice" also trace their ancestry from the early Greeks. In the early Greek city-state or polis citizens enjoyed political and civil freedoms and rights - hence Greek isotimia or equal respect for all. They were also protected against

tyranny by respect for the law and other legal restraint on government - hence Greek isonomia or equality before the law as contrasted to arbitrary rule. Greeks also enjoyed freedom of speech - hence the Greek isogoria or equal freedom of speech.¹¹

But of course when discussing the early Greeks' practice of natural rights, one has to bear in mind that the "nation" was narrowly conceived and was a mere reflection of those societies' prevailing social and political circumstances. For example, women, resident aliens and slaves were excluded from enjoying many civil and political rights. Moreover, Greek democracy, and therefore citizens' rights, operated in a small city-state, and for this reason cannot be a practical model for a large modern industrial state, with its complex governmental institutions. However, in spite of this, the point posited above remains valid, that the Greeks laid down the foundations of the essential elements of the idea of "human rights" by constructing a political scheme which tended to place limitations on governmental power in order to safeguard individual rights and freedoms.¹²

iii). The role of the Roman legal theories

When the Greek city-states collapsed, the natural law tradition was taken up by a number of Roman philosophers known as the "Sophists". The starting point in Stoa philosophical conception was to reject the Greek ideal of justice by contending that "there should not be a different city-state each with its own peculiar system of justice". Instead the

the Sophists placed the concept of "nature" in "the centre of their philosophical system". "Nature" in Stoa language meant "the ruling principle of the whole universe", which was identified with God. In the second place, these philosophers taught that man being a rational being was attributed with the capacity to know about the law of nature through "the dictates of reason".¹³ From a combination of these two propositions arose the Stoa ideal of a world-state "founded on the equality of all men and the universality of natural law". Cicero (106-43 BC), a great Roman lawyer and statesman, summarised the substance of Stoa philosophy thus:

".....And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and for all times, and there will be one master and one ruler, that is, God, over us all, for He is the author of this law, its promulgator, and its enforcing judge".¹⁴

What contribution, then, did the Stoa philosophy make towards the evolution of "natural rights" within the context of Roman political set-up? In the first place, like the early Greeks, from which much of this philosophy drew upon, state legislative activity could only be valid if it passed the tests provided by the "cosmic, natural order". In the second place, it will be seen from the expositions of Stoa philosophy thereabove that the Stoic version of natural law also emphasized the principle of "equality". Thus:

"The Stoic philosophers were convinced that men were essentially equal and that discriminations between them on account of sex, class, race, or nationality were unjust and contrary to the law of nature".¹⁵

Essentially because of the impact made by Stoic philosophy the idea of human equality constituted an essential feature in the political philosophy of the Roman Empire, and further gave growth to the humanitarian and egalitarian ideas.¹⁶

But what, in fact, was the reality of the Roman ideal of equality? Paradoxically, the objectives pursued by the Stoa was never put into practice. Thus differences between the legal status of free citizens and slaves, or between natives and foreigners were, as in the Greek polis, never eliminated. The reason for this in the Roman Empire might have been due to the appeals made by other new doctrines. Thus the classical Roman jurist Gaius, in his book the "Institutes" (AD 161), made a distinction between two species of laws: the jus civile and the jus gentium. The former was a law applicable to Roman citizens only. The latter was that body of rules which were applied in controversies involving non-citizens of Rome. To this dichotomy was added the third body of law, the jus naturale, i.e., the law of nature. From this categorization of legal institutions, it was now claimed that the institution of slavery and the treatment of aliens in a discriminatory manner was justified on the ground that it was part of the jus gentium, that is, the law applicable to non-citizens of Rome. Thus exclaimed the jurist Florentinus, "slavery is an institution of the jus gentium by which, contrary to nature, one man is made the property of another".¹⁷ And in Ulpian is found this, that: "So far as the civil law is concerned, slaves are not

considered persons; but this is not the case according to natural law, because natural law regards all men as equal".¹⁸

From the statements above it is evident that although slavery and other forms of discrimination were practised during this time, there nevertheless developed this other doctrine which questioned the validity of these practices in view of the overriding dictates of natural law which was asserting that "all men were originally born free".¹⁹ It is, fundamentally, in this respect that the Roman theory of natural law contributed to the development of the concept of "natural rights". And as Bodenheimer has concluded on this subject:

"The Stoic concept of a world-state with a common citizenship and a common law, based on natural reason, acquired a very real and non-utopian meaning under these circumstances. With the granting of citizenship rights to most of the Roman provincial subjects in 212 AD, the idea of a community of civilized mankind (Civitas Maxima), as opposed to the parochialism of the small city-states of earlier periods, had found an approximate reality. It was no wonder that under these conditions the philosophical concepts of Stoicism, which found additional support in the rise and spreading of Christian ideas, had a significant impact on the political and legal development of the Roman Empire".²⁰

iv) The role of early Christian doctrines

Again during the Roman Empire, the Roman tradition of natural law underwent a further twist, largely due to the influence of the philosophy of Christianity of this period. Early Christianity of the Middle Ages made use of the Stoic ideas of a world-state embracing the whole man - but they interpreted the Stoic concept of "world-state" to mean "divine empire" - hence the "Holy Roman Empire". In this system of thought a distinction was sharply made as between

two authorities, viz., the "State" as an earthly institution and the "Church" as the representative of the higher-ranking divine world. Further, according to this theory, the church claimed to be the guardian of the eternal law of God (lex aeterna) and since this was a higher order than that professed by the state, the church claimed an automatic supremacy over the state.

From the above expositions as put forward by the medieval Christian philosophers, arose this new dimension of natural law that man, being a citizen of the divine empire, possesses innate human dignity to which all external influences are subject. This "inalienable and unchangeable value" was inherently provided for in the eternal law of God of lex aeterna and, if the worldly law, or temporalis, contains provisions contrary to it, these provisions were of no force and should be disregarded. Among the fathers of the church who are associated with the teachings of the medieval catholic natural law were St. Augustine (354-430 AD), whose main thesis was the subordination of the world order, or the civitas terrena, to that of the divine order, or the civitas dei. St. Thomas Aquinas (1226-1274 AD) also stressed the point that natural law was a law higher than positive law, and therefore ought to be obeyed by all rulers of the world.

Paradoxically, as in early Greece, and the Stoa Roman Empire, medieval Christian traditions accepted the institution of slavery. But Christian tradition was more considerate by making some appeals to masters to treat slaves with consideration and kindness. The attitude of the fathers of

the church, including St. Paul, to slavery has been amply summarized by the Rev. Professor Dean Sydney Evans, as follows:

"Paul is more concerned with a man finding interior freedom than exterior freedom. He is more concerned to help slaves to come to terms with their condition than to change that condition. To be a slave or freeman, he says, makes no difference to God. Both are equally capable of knowing God and of living as children of God. In relation to Christ it is a matter of indifference whether a man is a slave or a free man. But by this same token Christian masters must treat their slaves with fairness, for the master is no dearer to God than is the slave".²¹

Thus, as the Rev. Sydney Evans now concludes:

"It could be argued that in this instance Christianity was an influence retarding the development of human rights thinking by accepting the institution of slavery while teaching the slave that he was no less in the eyes of God than his master".²²

Nevertheless, taking into account the circumstances of these times, it is evident that Christian doctrines contained sufficiently aggressive ideas about humanity, and the entire nature of scriptural teachings was aimed at formulating some concrete norms in order to enhance the quality of human social co-existence in dignity.

Although the set of ideas professed by Stoa and early Christendom no doubt meant a step forward on the historical path of attaining an "independent human personality", neither Stoa nor Christian philosophy provided ground to recognize human rights through a positive legal means. In other words, these teachings amounted to no more than stressing the fact that state activity towards individuals was to be limited not by legal, but by moral, religious or other ethical

considerations. This is, however, not to say that this was not an efficient machinery for individual rights protection given the social structure of these ancient states. But the next stage in the evolutionary history of human rights was decisive in the sense that for the first time signs of positivity in the contents of human rights were becoming evident.

v) Impact of feudalism

When the Roman Empire finally collapsed a number of tiny feudal kingdoms in much of Europe came into existence. Characteristic of this type of politico-social organizations was the increasing political power concentrated in the hands of the feudal monarchs. Invariably the rule provided by these monarchs was despotic and tyrannical. At the same time during these periods there was evolving rapidly - especially in England - a body of law designated as "common law" which, as well as being "common" throughout the kingdom "commonly" applied to the monarch and his vassals. Thus, in the ensuing conflicts between the monarch and his vassals, resort was made to "common law" in the settlement of the conflict of interests. Most of these conflicts arose in protest against the arbitrary and tyrannical pretensions of the monarchical rule. But the most significant aspect of the conflict-resolution arrangement was that the nobles succeeded on many occasions in having their demands to rights recognized in charters, documents, etc., issued by the monarch and binding on him. The most celebrated of these charters is, of course,

the Magna Carta of England (1215). Under Chapter 39 of the Magna Carta the "freeman" was protected against unlawful arrest, detention, expulsion and other restrictions upon personal liberty. Although, no doubt, the Magna Carta was an important (probably the first) "veritable symbol" in the legal protection of liberties in England, it seems not to have extended to cover the protection of liberties of the whole population. At most it was confined to the legal relationship between the nobles, barons of the realm on the one hand, and the crown on the other. The same remarks could be made of the English Bill of Rights which followed 474 years later (1689). The English Bill of Rights, like the Magna Carta, was an attempt to demarcate the powers of the king vis-a-vis Parliament and was a prompt reaction against the despotic rule of the Stuart kings. The preamble to the Bill of Rights, for example, is explicit on this point when it stipulates that "the late King James the Second by the assistance of diverse evil councillors, judges, and ministers employed by him did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom".²³ Thus when James II was forced to abdicate and William and Mary ascended the throne, the opportunity presented itself for Parliament to define and circumscribe the new rulers' powers, requiring them to govern within the limits defined by a statute - i.e. the Bill of Rights. This provided for the supremacy of the law, by denying the royal

power to suspend it, and for equality before the law; prohibited establishment of special courts and the levying of money without the consent of Parliament; provided for freedom of election; freedom of speech, and provided against excessive bail.²⁴

These then, were the agreed basis and conditions upon which the new monarch was to rule. As will become evident, most features of the English Bill of Rights are to be found in the Universal Declaration of Human Rights (1948), and it was therefore an important landmark in the future development of human rights, and inspired the more sophisticated developments in other countries, most noticeably in the United States one hundred years later.

vi) The "Social Contract Doctrine"

It will have become apparent from our discussion on the English Bill of Rights above, that this manifested itself in a form of a "contract" entered into between the monarch and the people as represented by Parliament. The contractual nature of this relationship impressed upon the political philosophers of the day, who now saw in this phenomenon a real pivot of political life, and who seized upon it in order to interpret the existence and limitation of the power of the state. During this era in Europe, national states were emerging which were invariably governed by absolute rulers with claims to freedom of political action. Consequently, the real issue in the political philosophy of the day was to find some rational means

whereby the doctrine of raison d'etat, which sought to subordinate the individual citizen to the needs of the state, could be tempered by the claims of the "natural rights" doctrine, which had traditionally favoured the preservation of the rights of man as inviolable and inalienable.²⁵

An English political philosopher, John Locke (1632-1704), saw the solution to the "State/individual" conflict of interests to lie in the doctrine of "social contract". Locke hypothesized that rights which were due to all individuals could best be upheld only by the doctrine of "the social contract". Under this theory, by entering into such a contract men agree, upon establishing a political community (factum unionis), to subject themselves voluntarily to the power of the community (factum subiectionis). In Hobbes' theory of social contract of an earlier period, (1588-1679), only the factum subiectionis, the agreement of submission of all natural rights of the subjects to the sovereign was ever discussed. But it was Locke who gave the institution of natural rights extra force, namely that men in establishing a political authority retain those natural rights of life, liberty and property - which he seems to group together under the single concept of property.²⁶ Locke further asserted that the government, being a party to the contract, could be resisted if it failed to fulfil its part of the bargain, which was the preservation of the liberties of men.²⁷

Locke's ideas about civil governments were exceedingly revolutionary and were to have an everlasting impact on the future evolution of the western constitutional theories of government. Its immediate impact was seen in the American revolution. The "natural rights" doctrine now travelled from England to America!

vii) From England to America

By far the greater part of the population of the American colonies who waged the war of "national" liberation, were English by descent, who ipso facto, were brought up in the English political culture. It is not, therefore, surprising that the war of liberation was justified on the claim of restoring those rights and liberties which had been attained by the citizens of England a century before.

When the war was finally won, the founding fathers of the American nation had no problem in resorting to Locke's theory of government as guiding principle upon which to base their form of government. The Lockian theory of natural rights, together with his doctrine of justified resistance against governmental oppression, indeed formed the philosophical background to the American Declaration of Independence. The Declaration, which was adopted on July 4, 1770, followed closely, indeed sometimes verbatim, Locke's line of views about "natural rights", as thus:

"We hold these truths to be self-evident that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness.

"That to secure these rights governments are instituted among men deriving their just powers from the consent of the governed; that whenever any form of government become destructive of these ends, it is the right of the people to alter or abolish it and institute new government".²⁸

Suffice it at this point to note one feature characteristic in this manner of conceiving the place of natural rights in the total frame of government - and this is that the American variety of natural rights implied that the state is not the creator of individual rights, but only recognizes and protects them. Further, following Locke's theory, the state is created for the purpose of protecting these rights. It is this feature of the Western notion of natural rights that is in direct variance with the socialist or communist theory of rights, since the latter conceive the state as the creator and giver of individual rights.²⁹ However, at this point in time of history this is not an important issue, but with the growth of international community as exemplified by the United Nations, we shall see that this constitutes an area of confusion and misunderstanding about the nature of individual rights.³⁰

However, coming back to the discussion on the philosophy of natural rights in the United States, it is important perhaps to observe that the philosophical basis of the American system of government was greatly influenced, not only by Locke's theory of natural law as explained above, but also by the philosophical teachings of a French nobleman by the name of Charles Louis de Montesquieu (1689-1755). Montesquieu's concept of legal philosophy was, in fact, a necessary

complement to that offered earlier on by John Locke.

Montesquieu agreed with Locke that human liberty was the highest goal that a nation can achieve, but he went further than Locke by attempting to devise a system of government under which liberty could be secured in the most practicable and efficient way. According to Montesquieu, a political system which would most effectively safeguard liberty is to be found in his theory of the "separation of powers".

"Constant experiences shows us", he said, "that every man invested with power is apt to abuse it, and to carry his authority as far as it will go".³¹ Therefore, to prevent such abuses Montesquieu argued that it is necessary that power should be checked by power. In Montesquieu's scheme, that form of government in which the legislative, the executive, and the adjudicative are separated, that is, made independent of each other and entrusted to different persons or groups of persons, offers the best prospects for the preservation of liberty. Furthermore, these three institutions of government must be so constituted as to hold each other in check.³² In his view, this kind of government structure would operate to prevent an undue extension and arbitrary use of governmental authority.

Montesquieu's political theory of the "separation of powers" was seized upon by the founding fathers of the American nation. In America, the constitutional division of government into three independent branches, accompanied by an intricate system of checks and balances to forestall supremacy of any one of these branches, owes its inspiration, no doubt, to

Montesquieu. Furthermore, such aspects of the US Constitution as the granting veto power to the Chief Executive, the vesting in the legislature of the power to impeach and try high officials, may be traced to Montesquieu's renowned treatise.³³

On the other hand, the Lockian theory of natural rights, especially his doctrine of justified resistance against governmental oppression, formed the philosophical background of the American Declaration of Independence. It has also been shown by Grant that the Lockian theory of natural rights has, in fact, influenced the interpretation of certain clauses of the Bill of Rights, especially the due-process clause, by the US Supreme Court.³⁴ The language of the Supreme Court in the case of Savings and Loan Association v. Topeka,³⁵ is cited to illustrate the theme advanced above. Here the Court said that:

"There are.....rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most undemocratic depository of power, is after all but a despotism.There are limitations on such power which grow out of the essential nature of all free governments, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name".

And quite obviously Locke's theory of natural rights was relied upon by the framers of the Constitution of the State of Virginia of June 12, 1776, which enacted that:

"..... men are by nature equally free and independent, and have certain inherent rights of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity: namely,

"the enjoyment of life and liberty, with the means of acquiring and possessing property, pursuing and obtaining happiness and safety".

But although, as we have seen above, the founding fathers through the Declaration of Independence of July 1770, based their case against the mother country on the rights of man as justifying their revolution, in the draft constitution of 1787 no attempt was ever made to enshrine these rights in the form of a bill of rights. A bill of rights in the USA came when Congress in 1791 passed ten amendments to the Constitution, which came to be regarded as forming part of the Constitution. The Bill of Rights provides that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or the press or the right of people peacefully to assembly, and to petition the government for redress of grievances.³⁶ The right of the people to keep and bear arms shall not be infringed,³⁷ and no soldier shall in time of peace be quartered in any house without the consent of the owner, not in time of war, but in a manner prescribed by law.³⁸ The right against unreasonable searches and seizures shall not be violated,³⁹ and subject to certain stated exceptions, no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, nor shall any person be subjected to double jeopardy with respect to the same offence. No person shall be compelled in any criminal case to be a witness against himself, nor shall he be deprived of life, liberty or

property without due process of law, and his property shall not be compulsorily acquired without just compensation.⁴⁰

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury, to be informed of the nature and cause of the accusation, to have compulsory process for obtaining witnesses on his behalf, and to have the assistance of counsel for his defence.⁴¹ There shall be the right to jury trial in civil suits involving more than twenty dollars.⁴² Excessive bail shall not be required, nor shall excessive fines be imposed. Similarly, cruel and unusual punishments shall not be inflicted.⁴³ Finally, it is provided that the constitutional enumeration of certain individual rights shall not be construed to deny or disparage others not yet mentioned.⁴⁴

But although this was, not doubt, a thorough document on the protection of civil liberties, it had two initial drawbacks. Firstly, the enjoyment of these rights did not extend to negroes, and secondly the Bill of Rights was limited to the Federal Constitution, as it only bound the Federal Government but not those of the states. However, at the end of the Civil War, Amendments 13-15, or the so-called Civil War Amendments, were adopted specifically to extend civil liberties to the now freed negroes, and to enforce the Bill of Rights against the states. Thus the 13th Amendment forbids slavery and involuntary servitude; the 14th, inter alia, broadens the base of American citizenship by providing that all persons born or naturalized in the United States are citizens of the United States and of the state wherein

they reside. And furthermore, no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The 15th Amendment provides that the rights of citizens of the United States shall not be denied or abridged by the United States or any state on the grounds of race, colour or previous conditions of servitude; and in 1920 it was provided that this right shall not be abridged or denied on account of sex.⁴⁵

Here we shall not concern ourselves with how the United States' Bill of Rights has worked in practice, and the kind of interpretations that the Supreme Court has placed on the various phrases used therein. There is now a mass of literature on this subject.⁴⁶ Suffice to mention the point here that in the United States the Courts, and especially the Supreme Court, have assumed guardianship over the Bill of Rights (and the whole Constitution, for that matter), and that the practical operation of the Bill there depends much upon the interpretation which the Supreme Court places on it.

Perhaps before we note the influences which the American experience had on the future development of human rights, we should also note the French experience, because these two experiences were singularly eventful in influencing the development of human rights in the international arena.

viii) The role of the French Declaration of the Rights of Man and of the Citizen, 1789

The French Declaration of the Rights of Man and of the Citizen, 1789, is eventful in the timing of the development of the concept of human rights in that this document contained perhaps the more important rights which were later to be adopted in the Universal Declaration of Human Rights, 1948; and also because the French Declaration has undoubtedly been a source of inspiration to many constitutions of the parliamentary type of the nineteenth and twentieth centuries in Europe, Latin America and the Francophone countries of Africa.

From the contents and formulation of the rights proclaimed in the Declaration, it is clear that it was in part inspired by the English and American experiences discussed earlier on, and was also heavily loaded with the political philosophy of the eighteenth century, but specifically with that of Jean-Jacques Rousseau (1712-1778). After its general affirmation of faith, the full text of the Declaration contained a list of seventeen articles proclaiming a number of the "natural and imprescriptible rights of man", clothed in a political philosophy that "the aim of all political associations is the protection of the natural and imprescriptible rights of man: liberty, property, security and resistance to oppression", and that "the law is the expression of the general will",⁴⁷ as opposed to one individual's will. The Declaration then lists a number of these rights - equality before the law,⁴⁸ freedom from arrest except in conformity with the law,⁴⁹ protection against retroactivity of the law,⁵⁰ the presumption of innocence,⁵¹

freedom of opinion,⁵² freedom of religion,⁵³ freedom of expression,⁵⁴ the right to property,⁵⁵ the right to representation in public institutions like Parliament,⁵⁶ and the right of control over public expenditure.⁵⁷

One should point out, however, that the French approach to the protection of the rights of man is distinguished from the American one in at least two respects. Firstly, the French Declaration of the Rights of Man uses the preamble as the place where the rights are guaranteed; secondly, the French Declaration proclaims the rights "in a general, absolute and dogmatic manner, the natural inalienable, imprescriptible and sacred rights of man, not of the man living in a country at a particular time, but of man in the abstract of all countries and of all ages".⁵⁸ The American approach has been to state the rights in the body of the Constitution in "relative and accurate" manner, obviously because they are intended to be the subject of judicial interpretation. The French formula of utilizing the preamble not only as a mere recitation of rights, but also as a means of guaranteeing them, was used both in the Fourth and Fifth Republics of France, and it is this libertarian tradition which France has handed down to many of its former dependencies in Africa.⁵⁹

However, the important point about the American and French incidents in the historical development of human rights, is that for the first time ever this concept, especially in the American model, was raised to the level of a

"constitutional institution", and also became a special constitutional law concept in that, being part of the supreme law of the land, all other legal norms in the legal system were subject to and derived their validity from it. And with this, the first stage of the historical development of human rights came to an end, the American and French experiences serving as models and examples which were to be followed in the process of constitutional evolution not only in Europe, but, with the rapid growth of an international consciousness of brotherhood, the human rights idea was steadily becoming a problem to be dealt with on a universal basis.

C. Human Rights and International Law

It will have become self-evident from our discussion above that well before the First World War the doctrine of human rights had already been firmly entrenched in the political systems of at least three leading Western countries, viz., England, America and France. Indeed the idea of human rights or natural rights of man occupied a real pivot of democratic life in the Western countries. It must, at the same time, be appreciated that the many emerging international customs, norms, conventions, etc., were being devised largely at the initiative of Western statesmen, scholars, organizations, etc. It is not, therefore, surprising, as we shall shortly see, that the idea of human rights was given a prominent role in the emerging international order, and attained that status because of the corresponding status which natural rights had won themselves in most of the Western countries. In fact, it will become clear that it was the principles underlying

"natural rights" which were restated into the international documents concerned under the new name of "human rights". It is significant, perhaps, to point out here that the expression "human rights" was adopted instead of "natural rights" simultaneously with the international campaign for the declaration of an international bill of rights. In what follows, we survey briefly the methods by which human rights became to be regarded as a matter of international concern and the extent to which the resultant international bill of rights and its offshoots reflected the contents of the old classical natural rights. The subject of the development of international protection or regulation of human rights can be studied from both before and after the Second War. Though our central commitment is with regard to the post-World War II period, the period before the War also provides an interesting, and perhaps an indispensable account of this subject.

i) International protection of human rights before World War II

Even before the first World War, concern for the protection of human rights on an international plane had steadily come to the fore and manifested itself in at least three basic ways, viz., through the doctrine of "intervention d'humanite",⁶⁰ international measures for the abolition of slavery,⁶¹ and finally through the doctrine of state responsibility for injury to aliens.⁶²

The doctrine of humanitarian intervention was derived from the very author of the Law of Nations, Grotius,⁶³ who stated that other states would be justified in intervening in another state for the purposes of protecting the

inhabitants of this state from oppressive or arbitrary treatment by the domestic regime. Such an action would be justified on humanitarian grounds. This doctrine, as would be expected, has been severely criticized as being contrary to the sovereignty of other states, and as affording a pretext for an interference in the domestic affairs of the other states in the name of human rights.⁶⁴

In the second place, early international concern for human rights was caused by the need for a concerted international front to suppress the evils of slavery and slave trade, more especially in Africa and on the high seas. To this end, various international conventions on the question of suppressing slavery and for "the safeguard of human personality" were generally signed.⁶⁵ The eventual success induced by this international effort directed at the suppression of slavery and servitude was later to be seen by the recognition of the "freedom from slavery or servitude, and freedom from inhuman or degrading treatment or punishment", which received protection by the Universal Declaration of Human Rights of 1948. This right also found its way into practically all Commonwealth African bills of rights.⁶⁶

In the third place, early signs of an international concern for the protection of human rights manifested itself through the doctrine of state responsibility for injury to aliens.⁶⁷ According to this doctrine, a principle was emerging in international law that State A could be rendered responsible for an injury caused to a citizen of State B.

According to Dr. Garcia Amador:

"The State is under a duty to ensure to aliens the enjoyment of the same civil rights, and make available to them the same individual guarantees as are enjoyed by its own nationals. These rights and guarantees shall not, however, in any case be less than the 'fundamental human rights' recognized and defined the contemporary international instruments".⁶⁸

This rule is of respectable antiquity which addressed itself to respect for the rights of an individual living in a foreign land and to his proper treatment. The rule, however, proved to be persistently ineffective because at this stage in the development of international law an individual possessed no subjectivity of his own in the eyes of international law, and therefore could not claim redress against the state which had allegedly violated his rights. Claim for redress under this rule had to be channelled through the intermediary of the state of which he was a citizen.

The point discussed above with respect to the standing of an individual under international law of the pre-First World War, merits a little further pursuance, because it was precisely this that retarded the development of human rights as a practical concept. The source from which the view that a private individual in international law (or the "law of nations", as this branch of law was popularly known), does not constitute a "legal entity", and therefore devoid of rights and obligations thereunder, was derived from the prevailing traditional positivist doctrine. Probably Oppenheim presents a concise, but clear formulation of the chief tenets of the "traditional positivist doctrine",⁶⁹ as thus:

"Since the Law of Nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are the subject of International Law. This means that the Law of Nations is a law for the international conduct of States, and not of their citizens..... An individual human being.....is never directly a subject of International Law".⁷⁰

The retarding effect of this doctrine on the development of the concept of human rights lay in the fact that the idea remained a theoretical value which an individual could not rely upon to secure redress for any of its alleged violations in any international tribunal. It was only after the Second World War, that this hurdle was overcome, with the adoption of the European Convention on Human Rights (1950) when for the first time an individual had access to international machinery for the actual enforcement of the guaranteed rights under the Convention.

ii) The Impact of the First World War and its aftermath

It could be asserted in general terms that the idea of international safeguards of human rights came to be gaining some concrete grounds after the First World War, more specifically when the scheme of the League of Nations was being constructed. The occasion which gave rise to the problem of an international concern for the protection of human rights was the need to devise some arrangements for the protection of minorities after the 1914-18 War. At the Peace Treaty of Versailles, the victors of the War contrived to reward themselves and their allies by means of territorial acquisitions. This plan involved the redrawing of national boundaries of the states in the eastern region of Central

Europe. This form of territorial rearrangement produced the inevitable result of leaving a large number of the indigeneous populations of the states concerned as minority groups subjected to the domination of states formed by other nationalities. The problem of minority protection thus became the central issue at the Peace Treaty Conference of Versailles because of the expressed fear that if it was not properly handled it could erupt into something that could ".....disturb the peace of the world".⁷¹ Consequently, a system of minority protection was introduced by the Covenant of the League of Nations with the primary object of providing for safeguards for the minorities, coupled with a machinery for checking against any arbitrary actions that would be meted out against them.⁷²

The method by which the "minority protection scheme" was implemented was through concluding a series of conventions or treaties between the states whose territories were extended, and the principal allied and associated powers. In other instances, there were declarations which were required to be made by certain states before the Council of the League of Nations, in which these undertook to respect minority rights.⁷³

These sets of agreements granted to all inhabitants, including aliens:- (i) the right to life and freedom; (ii) the right of the free exercise of religion; (iii) equality of all citizens before the laws, and equality in the enjoyment of civic and political rights; (iv) entitlement of minorities to their specific racial, denominational, or lingual freedoms -

like freedoms of the use of their own language, the right to keep schools or educational institutions, the right to use the minority language in public instructions, the support of the minorities from budgetary appropriations for educational or denominational purposes, or for charities.⁷⁴ These obligations for the protection of minorities constituted "international commitments" under the supervision of the League of Nations.⁷⁵ And any disputes arising from the minority agreements in general were to be referred to the Permanent Court of Justice, whose jurisdiction was binding, and the decision of the Court was final in the sense that no appeal was allowed.⁷⁶

However, "the minority system" under the League of Nations did not prove to be an effective means for an international protection of human rights, because, for one thing, the League itself, as an international institution for maintaining world peace and security, failed to command the confidence of some big powers; and, in any case, - and maybe for that reason - the League collapsed together with the rights of the minorities under its system. But in spite of this, it could be said that the minority scheme constituted an efficacious antecedent upon which an international protection of human rights was later to develop. This was now to be manifested in the United Nations' Bill of Rights consequent upon the cease-fire of the Second World War.

iii) International protection of human rights after World War II

Opportunity for the establishment of a comprehensive system for the regulation of human rights on an international plane presented itself only after the Second World War . It is also from this sytem that most of the rights and freedoms as found in the many bills of rights of the Commonwealth countries, are ultimately derived.

After the Second World War, many world statesmen and all those concerned with the restoration of international peace vowed never to allow any chance to arise for the future occurrence of any such costly disaster as the Second World War. To do this they first had to detect the major factor which caused the outbreak of the War, and then to seek to remove it as a way of paving the way to any future peace prospects. The War was, in fact, seen to have come about because of the increasing fascist activities in some European countries, notably in Germany and Italy, with the result that there were constant aggressions directed at the sovereignty of other states: and in their general internal performance these regimes displayed utter disrespect to the personal liberties of both their own citizens and aliens. The solution for the guarantee of future peace and security in the world was therefore seen to lie in "the enthronement of the rights of man", to which every government on the planet should be made to pay due respect. This interrelation between the protection of human rights and the safeguard of international peace and security, became the cardinal idea of the political settlement after the Second World War. When world statesmen and their

advisers were working out some kind of "rational scheme of world order" to guard against the threats to peace and security, the concept for an international protection of human rights was seen as one of the most important means for the realization of that end. When the "scheme for the world order" was finally worked out, it proved to be in the nature of the arrangements under the United Nations. And since it was to this organization that a major part in the promotion of international peace and security fell, it also happened that the problems associated with the protection of human rights on an international level equally fell to that organization for their solution. It is for this reason that we find that the promotion of the respect for human rights was made one of the fundamental objectives of the Charter, and it is within this context that the spirit behind the Universal Declaration of Human Rights was implemented. But before we come to consider the Universal Declaration and its influence on the regional and national imitations for the guarantee of human rights, it is worthwhile to pause and examine the significance of the provisions of the UN Charter on the later development of the concept of human right.

iv) The role of the United Nations' Charter

Unlike the Covenant of the League of Nations, the United Nation's Charter contains the idea of the international safeguard of human rights, which is mentioned at seven different places within the Charter.

According to the Preamble of the Charter, member states of the United Nations pledge themselves "to affirm faith in the fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women". And one of the purposes of the United Nations' Organization is "to achieve international co-operation in solving international problems of economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion".⁷⁷ The task of promoting these ends falls to the General Assembly which shall initiate studies and make recommendations "for the purpose of assisting in the realization of human rights and fundamental freedoms".⁷⁸ Further in the area of international economic and social co-operation, the Charter provides that the United Nations would promote the universal respect for these rights.⁷⁹ As a result of this, the Economic and Social Council of the United Nations was called to life specifically to deal with the promotion of international co-operation, among whose functions is to put forward recommendations "for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all".⁸⁰ And of course the competence of this Council extends to the formation of commissions for the promotion of human rights,⁸¹ as it did with regard to the International Human Rights Commission. Finally, in Chapter XII on the International Trusteeship system, the Charter declares

that one of the basic objectives of the trusteeship system was also to encourage respect for human rights for all without distinction as to race, sex, language, or religion.⁸²

It is beyond doubt in the light of the foregoing provisions in the Charter of the United Nations, that one of the objectives of the Organization is to promote and further the aims of human rights, and that specific organs of the Organization are specifically defined in relation to their functions in the safeguarding of human rights. The importance of this element of the Charter for our purposes is that for the first time in the annals of the history of human rights, the "society of nations" gave formal recognition to the principles of human rights. Further the Charter declares that it is the aim of the United Nations "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples",⁸³ and in terms of Article 56 of the Charter, member states pledge themselves "to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55". These provisions complete laying down what we may refer to as the basis or pre-conditions for the effective safeguard of human rights, by calling upon nations to a genuine commitment in the advancement of these ideals.

One feature of the Charter, in so far as provisions for human rights are concerned, calls for mention, and this is that there are no special provisions in the Charter for the protection of minorities as such, but only sanctions general protection of human rights to the exclusion of any discrimination. It might

be considered, as Green does, that by preventing discrimination emphatically, the Charter was also aiming at condemning any form of discrimination, the basis of which may be "race, sex, language, or religion".⁸⁴

Of much significance, the UN Charter implied within itself some inherently revolutionary doctrines, such as the doctrine of equal rights and that of self-determination. The revolutionary nature of these doctrines soon came to manifest themselves in relation to the political status of the colonial peoples, especially those of the Indian subcontinent and of Africa. We have already indicated that the new world order within which everybody now wanted to live, was to be based on the sanctity of, and respect for human rights "for all men....." Under the provisions of the Charter, the attainment of the equality of rights and self-determination of all men was made the duty of all member states, including all those states which had overseas colonies. Soon the Charter was seized upon to provide justification for demands of political freedom for the colonial peoples, and the United Nations, with its relevant organs, became the forum at which the demands for national independence of the hitherto dependent peoples were voiced. One effect of the Charter, therefore, was that it helped to generate nationalistic feelings in the colonial territories, and it is within this context that one can understand the proposition that when independence was granted to these territories, the idea of human rights upon which the struggle for national independence

was justified, featured prominently in the accompanying constitutional settlements. On the other hand, the proposition can claim only a half-truth for although a "human rights climate" had undoubtedly been achieved in the 1950's, there was another factor which stood in the way of the constitutional basis of human rights: this was the influence of the English constitutional practice with respect to the protection of personal liberty. We discuss this subject at an appropriate point later in this inquiry.

v) The role of the Universal Declaration of Human Rights, 1948

The incorporation of the idea of an international guarantee of human rights in the United Nations' Charter, was no doubt eventful in the history of human rights. The Charter being like the "Constitution" of the UN, the references to human rights that we have dealt with were laid down in very broad terms, and left the task of elaborating upon them to the United Nations itself, or to its organs concerned with human rights. This can be confirmed by the fact that the Charter does not embody any catalogue of human rights: therefore, the next logical stage in the development of human rights was the need to define in some precise way the nature and substance of the rights to be protected, and to devise some means, if possible, for their practical implementation. The work in this direction was initiated by one of the United Nations' principal organs concerned with human rights, the Economic and Social Council, when it resolved on the 21st June 1946, in favour of an international bill of rights. The Council declared that:

"The mission of the United Nations for the promotion and protection of human rights as laid down in the Charter cannot be fulfilled unless measures are taken for the problem of human rights and an international charter of human rights is drawn up".⁸⁵

In consequence of this declaration, the Commission on Human Rights, one of the functional commissions of the Economic and Social Council (set up by the latter in 1946 in terms of Article 68 of the Charter), announced that an international bill of Human Rights would be drafted.⁸⁶ This proposal was quickly approved by the General Assembly of the UN. The actual draft of the Universal Declaration of Human Rights was adopted on the 10th December 1948, in the form of a resolution of the General Assembly.⁸⁷

vi) The nature of the rights guaranteed by the Universal Declaration

The nature of the specific rights and freedoms which the Universal Declaration embodied, was in no significant way different from the traditional natural rights which had already been achieved in England, America and France. But, on the other hand, the Declaration also constituted a radical reaction against the traditional conception of human rights by virtue of the fact that it deals not only with basic political and legal rights, but also with the economic, social and cultural rights. We discuss the subject of the substance of the international bill of rights with reference to two propositions:

a) The Declaration as a restatement of traditional "natural rights"

It is abundantly clear, even from a mere introduction to the language of the Declaration without considering in detail the substance of most of its items, that the

document draws heavily from such earlier documents inspired by "natural rights" thinking as the English Bill of Rights, 1688; the French Declaration of the Rights of Man and Citizens, 1789; and the American Bill of Rights, 1791. In this respect it is worth noting that twenty-one out of the thirty articles of the Declaration deal exclusively with the traditional civil and political rights which invariably occur in all of the earlier documents mentioned above. Article 1, for example, following the French Declaration, reads "All human beings are born free and equal in dignity and rights....." The remaining first twenty guaranteed civil and political rights were also familiar ideas developed from natural law. These include the rights to life, liberty and the security of person;⁸⁸ freedom from slavery or servitude and the prohibition of slavery and the slave trade;⁸⁹ freedom from torture or cruel, inhuman or degrading treatment or punishment;⁹⁰ the right to recognition as a person before the law;⁹¹ equality before the law and equal protection of the law;⁹² the right to an effective remedy by the competent national tribunals;⁹³ the right to be presumed innocent until proved guilty;⁹⁴ freedom of movement and to leave any country including his own, and to return to it;⁹⁵ the right to seek and enjoy asylum;⁹⁶ the right to nationality;⁹⁷ the right to property;⁹⁸ freedom of thought, conscience and religion;⁹⁹ freedom of opinion

and expression;¹⁰⁰ the right to peaceful assembly and association;¹⁰¹ the right to take part in the government of one's own country;¹⁰² the right of access to public service in one's country;¹⁰³ freedom from arbitrary arrest, or detention;¹⁰⁴ freedom from interference with a person's privacy, family, home or correspondence, and protection against attack upon his honour and reputation;¹⁰⁵ etc.

However, the claim that is asserted here in relation to the above mentioned rights and freedoms, is not that each and every one of these rights in the Declaration necessarily takes the same form and shape as the parallel provisions found in the earlier proclamations based on natural law, but rather that as the Declaration was thus not an original document with regard to the contents it enshrined. But the Declaration merits positive acclamation, especially because it improved upon the formulations of these rights, and also because it is a comparatively modern document, it certainly reflects fairly well on the problems of modern governments in relation to an individual.

b) The Declaration as a reaction against the traditional conception of human rights

We have already mentioned that the Declaration did not stop at only enunciating the civil and political rights discussed above, but also went further to embrace the provisions on economic, social and cultural rights

which are contained in the Articles from 22 to 28. These are the Articles which provide that everyone has a right to social security, to work under just and favourable conditions, and to join trade unions for the protection of his interests; the right to rest and leisure, the right to an adequate standard of living, the right to education, to participation in the life of the community, to enjoyment of arts and to a share in scientific advancement and its benefits. These rights are not of the same character as the classical "natural rights" that we have all along been discussing. On the contrary, the social, economic, and cultural rights derive their philosophical content from the socialist understanding of the role of the "State" and "law" in society. The foundations of the socialist theory of rights and duties are contained in the works of Karl Marx and Frederic Engels,¹⁰⁶ as elaborated upon and further evolved in Lenin's doctrine on the socialist state and constitution. Briefly, these theoretical conclusions concern on the one hand the criticism of the bourgeois concepts of rights and duties, revealing the underlying reasons of the bourgeois constitutional and other legal regulations; and on the other hand stress the position of the working-class in relation to the "citizens' rights and duties" which, as institutions, are translated into a legal reality in a

socialist state. Further, it is characteristic of socialist constitutions that they are not limited to legal or constitutional issues; they regulate not only the form of the given socialist state, the structure of its government, etc., but also provide for the social and economic programmes of the state. In fact, quite a vast space in a socialist constitution of an eastern type is devoted to the economic, social and political structure of the socialist society.¹⁰⁷

The Constitution of the Soviet Union provides perhaps a vivid example of what is asserted above. The Soviet Union has a constitution of 174 articles,¹⁰⁸ with basic Chapters, inter alia, on "the Political system",¹⁰⁹ "the Economic system",¹¹⁰ the "Social Development and Culture",¹¹¹ and on "the Basic Rights, Freedoms and Duties of Citizens of the USSR".¹¹² The Constitution also contains a variety of provisions about the institutional structure of the State, as well as procedures for the exercise of government powers - "indeed a full paraphernalia of a seemingly regularized system of restraint".¹¹³ Yet, as has been observed, "all this seems to be nothing but a facade", since, "the Constitution reads more like a political manifesto than a legal charter, and may indeed have been intended by its framers to have no more than a political existence".¹¹⁴

The truth of the observation stated above about the Soviet Constitution, is confirmed by the fact that individual rights therein are purported to be guaranteed

under two different formulae: in the case of the social and economic rights, by stating that "citizens of the USSR have a right to them", and by describing the means by which the right is ensured, e.g., "the right to work is ensured by the socialist organization of the national economy, the steady growth of the productive forces of Soviet society, the elimination of the possibility of economic crises, and the abolition of unemployment".¹¹⁵ No doubt "rights" of this nature are not justiciable legal rights. The other formula declares certain rights as either "an indefensible law", e.g., equality of rights of citizens,¹¹⁶ or as "guaranteed or protected by law", e.g., freedom of speech, press and assembly;¹¹⁷ the inviolability of the homes of citizens and privacy of correspondence.¹¹⁸ Even these types of rights are not justiciable rights which the Constitution envisages that an individual may assert against the State. In any case, under the Soviet Constitution, no procedure for the enforcement of these rights either by the ordinary court or otherwise is available. Thus, "the so-called guarantee of the rights in the Constitution of the USSR means no more than a declaration of objectives, a statement of what the State will, hopefully, do for its citizens".~~119~~

The socialist approach to the protection of human rights, therefore, differs in some fundamental way from that of the "bourgeois" states. The constitutions of the

latter do not contain statements on the social, economic and cultural rights as such, but cover only legal issues, and are therefore strictly documents of a legal nature. Herein lies the problem which the authors of the Universal Declaration faced - namely, how to reconcile and accommodate the two ^{world} ideological approaches to the question of human rights: that is, the socialist and Western concepts of human rights. It is therefore not surprising to see that the Universal Declaration, apart from incorporating the "traditional civil liberties" which developed from the West, also incorporates the so-called social and economic rights which the socialist countries regard as equally important.

In concluding our discussion on the nature of the rights under the Universal Declaration, a remark ought to be made here that, for all the significance attributed to this document, it had from the very beginning one serious defect, which was that no machinery for the actual enforcement of the guaranteed rights was ever established. As could be deduced from the broad nature of its provisions, plus the inclusion of the social, economic and cultural rights, the Declaration - or rather the rights under it - were not meant to be enforced through some established institution. On the contrary, as the Preamble to the Declaration proclaims, the Universal Declaration was meant to be ".....a common standard of achievement for all peoples and all nations....." This

inadequacy of the Declaration was overcome two years later after its proclamation by the adoption of the European Convention on Human Rights in 1950 by European states. The Convention applies only to European states who are signatories to it, and therefore the majority of the states still remain without some kind of international machinery for the enforcement of human rights. However, the fact is that the adoption of the Universal Declaration constituted an important step, in as much as the future development of human rights was concerned. The period after the Second World War up to the present date has been characterized by seeking means for effective protection of human rights, either by states in a particular region, or by states which have achieved sovereign status after the Second World War, by requiring that a bill of rights be written into their respective constitutions. The question, however, is how, and to what extent, did the Universal Declaration influence the spread of human rights in Africa?

NOTES

1. Figures derived from Africa: South of the Sahara (1978-79), (Europa Publications), p.1110.
2. Infra.
3. J.S. Read "Bills of Rights in the Third World", (1973), V.R.U., 1, at p.27.
4. H. Lauterpacht, An International Bill of the Rights of Man (New York, 1945), p.17.
5. See the account of Zoltan Peteri, "Citizens' Rights and the Natural Law Theory", in Socialist Concept of Human Rights (Akademiai Klado, Budapest, 1966), p.86.
6. Sir Norman Anderson, The Hamlyn Lectures (Thirtieth Series), Liberty, Law and Justice (Stevens, 1978), p.34.
7. Ibid.
8. Ibid.
9. See an account of Maurice Cranston, What are Human Rights? (London, 1973), Ch.11; and also Edgar Bodenheimer, Jurisprudence (Harvard University Press, 1962), Ch.1.
10. See Sir Ernest Baker, Greek Political Theory (London, 1951), Chs. I and II. Also H. Sabine, A History of Political Theory (Dryden Press, 1973).
11. Cf. Gaius Ezejiolor, Protection of Human Rights under the Law (Butterworths, 1904), p.s. Also M. Cranston, Human Rights Today (1962), p.9.
12. H. Sabine, op.cit., Chs. 1 and 2. Also Frede Castberg, "Natural Law and Human Rights: An Idea-Historical Survey", in Nobel Symposium 7, edited by A. Eide and A. Schou (London, 1968), pp.12-14.
13. See Bodenheimer, Jurisprudence, op.cit., esp. pp.13-19; also A.P. d'Entrevies, Natural Law (London, 1972), Ch.4.
14. De Republica, III, xxii, 33, quoted by A.P. d'Entrevies, Natural Law, ibid., 2nd edition, p.25.
15. Bodenheimer, Jurisprudence, op.cit., p.16.
16. Ibid.

17. Dig. 1.5.4. quoted by Edgard Bodenheimer, op.cit., p.17.
18. Dig. L17.32, cited ibid., underlining supplied.
19. Inst. 1.2.2.
20. Bodenheimer, Jurisprudence, op.cit., pp.19-20.
21. Christianity and Human Rights, in An Introduction to the Study of Human Rights, edited by Francis Vallat, (Europa Publications, London), p.11.
22. Ibid.
23. See Ian Brownlie, Basic Documents on Human Rights (Clarendon Press, Oxford, 1971), pp.3-5.
24. Ibid., pp.5-7.
25. See Bodenheimer, Jurisprudence, op.cit., Ch.III.
26. See Bertrand Russell, History of Western Philosophy (London, 7th edition), pp.610-13.
27. Ibid., p.614.
28. See Friedrich and McCloskey, From the Declaration of Independence to the Constitution (1954), p.3; also quoted in Gaius Ezejiiofor, Protection of Human Rights Under the Law
29. See Imre Szabo, "The Socialist Theory of Citizens' Rights and Duties", in Socialist Concept of Human Rights, Jozsef Halasz, Redigit, (Akademian Kiado, Budagest, 1966), pp.53-74.
30. Infra., pp.43-46.
31. The Spirit of the Laws (trans. T. Nugent) (New York, 1900), Bk. XI, Ch.iii, quoted by Bodenheimer, Jurisprudence, op.cit., at p.49.
32. Ibid., see particularly id., Bk.XI, Ch.v. This proposition is also discussed by Bodenheimer, p.49.
33. The Spirit of the Laws, op.cit., Ch.v.

34. J.A.C. Grant, "The Natural Law Background of Due Process", 31 Columbia Law Review 56 (1931); see also Lowell J. Howe, "The Meaning of Due Process of Law", 18 California Law Review 583-589 (1930).
35. 20 Hall 655, at 662-663; quoted by Bodenheimer, op.cit., p.50.
36. 1st Amendment; see Ian Brownlie, Basic Documents, op.cit., p.11-13.
37. 2nd Amdnment.
38. 3rd Amdnment.
39. 4th Amendment.
40. 5th Amendment.
41. 6th Amendment
42. 7th Amendment
43. 8th Amendment.
44. 9th Amendment. The 10th Amendment reserves the residue of powers to the states or to the people.
45. 19th Amendment.
46. See, for example, Emerson, Haber and Dorsen, Political and Civil Rights in the United States (3rd edition, 1967); Chafee, How Human Rights got into the Constitution (1952); Konvitz, Bill of Rights Reader (4th edition, 1968).
47. See general Jean-Jacques Rousseau: The Social Contract and Discourses by G.O.H. Cole (1973); in particular see pp.172-181.
48. Article 1.
49. Article 9.
50. Article 8.
51. Article 9.
52. Article 10.
53. Article 10.
54. Article 11.
55. Article 17.
56. Article 14.
57. Article 14.

58. Criton Torndritis, "The Human Rights as recognized and protected by law with Special Reference to the Law of Cyprus", in the International Round-table Discussion on Human Rights, Berlin (1966), p.123.
59. See, for example, the Constitutions of Chad, Central Africa Republic, Madagascar and Mali. Note also that this method guaranteeing rights as preambular existants is not recognized in the English tradition as a mechanism of creating legal rights or obligations, and as such, rights guaranteed in this way cannot have legal force.
60. For an extended account see G. Ezejiofor, Protection of Human Rights Under the Law, op.cit., pp.33-34; also see Stowell, Intervention in International Law (1921), from p.52.
61. Cf. A. Robertson, Human Rights in the World (Manchester, 1972), pp.15-17.
62. Cf. J. Vyver, Seven Lectures on Human Rights (Juta and Co. Ltd., Cape Town, 1976).
63. In his famous work published in 1650, "De Jure Belli ac Pacis", translated by Rev. A.C. Campbell (1814).
64. Hanna Bokor criticizes the doctrine because it could induce a situation where the interfering state may only be interested in imposing this system of political thoughts "rather than an action for the safeguard of human rights". Quoted in Socialist Concept of Human Rights (ed. Szabo and Kovacs) (Budapest, 1966), p.267.
65. For example, in 1814 by the Treaty of Paris, Britain and France undertook to co-operate for the purposes of suppressing traffic in slaves. And at the Vienna Congress of 1815 representatives of Austria, France, Great Britain, Portugal, Prussia, Spain, Sweden and Russia declared that trade in Negro slaves be prohibited.
The Berlin Conference (1885) on Central Africa stated in its final Act - called the Congo Act - that trading in slaves should be suppressed in Africa.
66. See Articles 4 and 5 of the Universal Declaration of Human Rights, 1948. See also Article 3 of the European Convention on Human Rights. In 1926 a Slavery Convention was signed and came into force on 9th March 1927. The aim of the Convention was to define slavery and associated practices. See, for example, Articles 1(1)(2) and 2(a)(b) and Article 3, document reproduced in Brownlie, Basic Documents, op.cit., pp.120-127.

67. For an excellent exposition of this principle refer to Sohn and Buergenthal; International Protection of Human Rights (New York, 1973), at Ch.II.
68. Articles 5 and 6 of his "Draft on International Responsibility of the State for Injuries caused in its Territory to the Person and Property of Aliens", in Sohn and Buergenthal, op.cit., p.133.
69. A detailed account of this doctrine is dealt with by P.P. Remec in The Position of an Individual in International Law according to Grotius and Vattel (The Hague, 1960), Ch.1; see also Ezejiofor, op.cit., Ch.II; and Carl Norgaard, The Position of the Individual in International Law (Copenhagen, 1962), Ch.III.
70. F.L. Oppenheim, International Law (Longman Green and Co., 1905), 1, par.13, 18f. Quoted in P.P. Remac, op.cit., p.3.
71. President Wilson of the USA in A History of the Peace Conference of Paris (London, 1920-1924), Vol.1, at p.30. Also quoted by Ezejiofor, op.cit., at p.38.
72. For a thorough treatment of the system established under the protection of the League, see L.C. Green, Human Rights, Federalism and Minorities (Toronto, 1970); also Oppenheim, op.cit., 8th edition, pp.711-16.
73. For all these treaties, conventions and declarations see The League of Nations' Information Bureau, On Protection of Linguistic, Racial and Religious Minorities by the League of Nations (1927); and as to the nature, substance and legal character of these instruments see Ezejiofor, op.cit., pp.38-51.
74. See Series of League of Nations' Publications, Official No.C.8.M.5. (Geneva, 1931), called Protection of Linguistic, Racial or Religious Minorities by the League of Nations, pp.160-65.
75. These provisions in fact were made sacrosanct in the sense that they could not be amended without the prior majority consent of the Council of the League of Nations.
76. In one well known case in which the Council of the League of Nations referred the complaint regarding minority rights, the Permanent Court of Justice asserted its jurisdiction sharply by ruling that the closing of the minority schools in the minority state of Albania "constituted breach of the obligation to maintain equality of treatment". The case of Minority Schools in Albania, Opinions of the PCJ of 6th April 1935, Publication of the PCJ, Series A-B, No.64; the case is also discussed by Ezejiofor, op.cit., pp.46-51.

77. Article 1(3).
78. Article 13(1)(b).
79. Article 55(c).
80. Article 62(2).
81. Article 68.
82. Article 76(c).
83. Article 55.
84. J. Green, The United Nations and Human Rights (Washington, 1956), pp.92-93.
85. Journal Officiel du Conseil, 13 Juillet 1946, No.28; see generally pp.521-527.
86. It was proposed that the bill was to consist of three sections, viz., a Universal Declaration of Human Rights, a Covenant on human rights, and finally measures for the implementation of human rights; ECOSOCO, Office Records, 3rd year, Sixth Session, Suppl. No.1 (1948).
87. UN Doc. A/811.
88. 88. Article 3.
89. Article 4.
90. Article 5.
91. Article 6.
92. Article 7.
93. Article 8.
94. Article 11(1).
95. Article 13(1)(2).
96. Article 14(1).
97. Article 15(1)(2).
98. Article 17(1)(2).
99. Article 18.
100. Article 19.
101. Article 19(1)(2).

102. Article 21.
103. Article 21(2).
104. Article 9.
105. Article 12.
106. For a general discussion of the Marxist-Leninist interpretation of the "Citizen's Rights and Duties", see Jozsey Halasz Redigic Socialist Concept of Human Rights, op.cit., esp.Chs.II, VI and VII.
107. Ibid.
108. "Constitution of the Union of Soviet Socialist Republics", by John N. Hazard in Constitutions of the Countries of the World, (ed. A.P. Blaustein and G.H. Flanz) (Oceana Publications, Dobbs Ferry, New York, 1978).
109. Ch.1.
110. Ch.2.
111. Ch.3.
112. Ch.7.
113. Nwabueze, Constitutionalism in Commonwealth Africa (Hurst and Co., London and Enugu, 1973), p.2.
114. Ibid.
115. Articles 39 and 40.
116. Article 34.
117. Article 50.
118. Article 55 and 56.

CHAPTER 2

RECEPTION OF THE CONCEPT OF HUMAN RIGHTS IN AFRICA

There is no doubt that since its adoption in 1948, the Universal Declaration of Human Rights has had remarkable impact on many countries of the world, not least on those of Africa.¹ The amount of influence which the Universal Declaration has had on the many national constitutions and municipal legislations throughout the world was given public recognition by the Secretary-General of the United Nations, U Thant, at the International Conference on Human Rights in Teheran in 1968 - the United Nations' "Human Rights Year". The Secretary-General reckoned that there were no fewer than forty-three constitutions adopted in recent years which were clearly inspired by the Universal Declaration, and that examples of legislation expressly quoting or reproducing provisions of the Declaration could be found in all continents.² The Universal Declaration has also exercised a powerful influence in the production of many international treaties and conventions, declarations, etc., of a world-wide character or of a regional character alike whose aim has been the promotion and implementation of certain of the rights stated in that document.³ In what follows we discuss this theme in relation to Africa, noting the avenues through which the concept of human rights and respect for human rights found their way into the many independence constitutions of Africa. In this respect it may be noted that in relation to this subject there are two ways through which the idea of human rights came to be diffused into the African political imagination both before and after independence. Even before independence in many African states there was a clear acceptance of the idea of respect for human rights as enshrined in the Universal Declaration. This is clearly detectable from an examination of the role played by Africans in the

international protection of human rights as seen from the activities of the various African organizations and conferences. In the second place, human rights found their way into Africa through their inclusion in the independence constitutions, which, in the case of most of the Anglophone African independence constitutions, contained bills of rights patterned on the European Convention (1950) which was itself based on the Universal Declaration.

A. Acceptance of Human Rights as enshrined in the Universal Declaration by African States generally

It is significant that the ^{developments} which were taking place in the field of human rights, engendered by the Universal Declaration, coincided with the rise of African nationalism after the Second World War, and, in the 1960's, with the emergence on the world political scene of newly independent African states. In these circumstances, the adoption of the United Nations' Charter with its human rights provisions, e.g., the right to self-determination and equality of all peoples, coupled with the eventual elaborations of these rights and freedoms in the Universal Declaration, provided the colonial peoples with a legitimate means of challenging their colonial masters and denouncing colonialism generally as being contrary to the UN Charter and therefore a violation of human rights. So, even in the pre-independence period, many African nationalist leaders had already become acquainted with the ideology of human rights and of its value in government as an indispensable attribute of democracy. A good example of this was the "Declaration of Fundamental Human Rights", of October 1960, by Zambia's dominant nationalist party, the United National Independence Party (UNIP). The year 1960 was four years before the attainment of independence by Zambia but UNIP's declaration of human rights was part of the

nationalist strategy to encourage the struggle for the achievement of national independence by creating confidence in all those concerned that the independence "Constitution would contain fundamental safeguards guaranteeing the freedom of the individual and providing against abuses of power by the Executive", and that the concession to include a bill of rights in the independence constitution was "an expression of UNIP's belief in the dignity and freedom of the individual, and in the principles of justice and charity to all".⁵

There were fourteen of the principles of human rights which UNIP promised to entrench in the constitution, and practically all of these were to be found in the Universal Declaration - although differently framed. These included the right to life, liberty and security of person; equality of all citizens before the law; prohibition of arbitrary arrest, detention, etc., save in accordance to law; freedom from interference with one's privacy, home or correspondence; freedom of peaceful assembly and association, including the right to form political parties and trade unions; freedom of opinion and expression, provided publication of indecent, seditious or blasphemous matter were to be punished in accordance with law; freedom of thought, conscience and religion; right to adequate standard of living, including good health for oneself and one's family; duty on the part of the new state to safeguard the economic interest of the weaker members of the community, etc.; right to own property; freedom from discrimination on grounds of race, colour or sex; right to education; no person was to be tried on any criminal charges save in due course of law and before an ordinary court, and no special courts or tribunals for the trial of criminal offences may be established.⁶

The African readiness to support and defend the ideals proclaimed in the United Nations' Charter and the Universal Declaration was becoming apparent, judging from their attitudes to the international protection of human rights and their role in its implementation.

The African movement which culminated in the establishment of the Organization of African Unity in 1963 sprang from a series of conferences organized by the only few African independent states during this time, but also attended by delegates from the new political parties which had developed in various African territories. The first of such conferences was held at Accra in April 1958, and from Zambia, Kenneth Kaunda (now the President of Zambia) represented the newly-founded nationalist party - the Zambia African National Congress which changed its name to "United National Independence Party" in 1960, and which was the party that succeeded in bringing about political independence to the territory of Northern Rhodesia (as Zambia was then called). However, the Declaration which emerged from this gathering proclaimed the "unswerving loyalty to the Charter of the United Nations.....and of the Universal Declaration of Human Rights",⁷ and also mentions the resolved "recognition of the equality of all races and of the equality of all nations, large and small....."⁸ In the Accra Declaration the African leaders urged immediate steps to be taken by the "Administering Powers" of colonial Africa "to implement the provisions of the Charter and the political aspirations" of the colonial peoples. The African delegates castigated, as against the objectives of the UN Charter and the Universal Declaration, the practice of racial discrimination ".....in South Africa, the Central African Federation, Kenya and other parts of Africa".⁹

The Second Conference of Independent African States and their allies held at Addis Ababa in 1960 was equally emphatic on the human rights exaltation. The Declaration which emerged from this conference reaffirmed "that the subjugation of peoples to alien domination and exploitation constitutes a denial of fundamental rights.....contrary to the Charter of the United Nations and the Universal Declaration of Human Rights....." At this conference too the suppression of national liberation movements, coupled with indiscriminate detention and restriction of nationalist leaders, was condemned as unjustifiable in the context of the standards defined by the Universal Declaration.

When the Organization of African Unity (OAU) was finally established in May 1963, the preamble to its Charter declared that the founders of the Organization were ".....persuaded that the Charter of the United Nations and the Universal Declaration of Human Rights.....provide a solid foundation for peaceful and positive co-operation among states".¹⁰ Article II of the OAU Charter sets out as one of its aims: "to promote international co-operation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights".¹¹

The OAU acted as an instrument through which African states concerted their actions to influence the United Nations in the field of the international protection of human rights. Increased African (and Asian) pressure forced the United Nations' General Assembly, for example, to produce the International Convention on the Elimination of All Forms of Racial Discrimination which was adopted in 1965.¹² This was the first international instrument on human rights directly adopted by the United Nations attempting to.

implement on a world-wide basis "the idea of the equality of races" and containing a strict international machinery of implementation.¹³ This achievement in the field of human rights at the instigation of the Afro-Asian bloc was akin to the one which the same group virtually forced into action as early as 1960. In that year the United Nations' General Assembly produced a "Declaration on the Granting of Independence to Colonial Countries and Peoples".¹⁴ In its preamble the Declaration referred to the

"determination proclaimed by the peoples of the world in the Charter of the United Nations to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and to promote social progress and better standards of life in larger freedom".¹⁵

The General Assembly then called on serious commitment to the principle of "Self-determination" "which counsels that all peoples anywhere on earth have the right freely to determine their political status and freely to pursue their economic, social and cultural development".¹⁶ Henceforth arguments based on the inadequacy of political, economic, social or educational preparedness among the dependent peoples should not serve "as a pretext" for delaying independence.¹⁷ Finally, immediate steps were to be taken in Trust and Non-self-governing Territories or all other territories which had not yet attained independence, to transfer all powers to the peoples of those territories unconditionally and without any reservations.¹⁸ Significantly, the Declaration introduced the concept that "all states shall observe faithfully and strictly the provisions of the Charter of the UN, the Universal Declaration of Human Rights...."¹⁹

The duty to "observe faithfully and strictly" the provisions of the Universal Declaration was clarified in 1968 to mean that "the Universal Declaration of Human Rights constitutes an authoritative interpretation of the Charter of the highest order and.....become a part of customary international law".²⁰ Further, at the Teheran Conference, already referred to above, the Secretary-General of the UN emphasized the point that the Universal Declaration constitutes "an obligation for the members of the international community".

Coming back to the African scene, developments in the area of human rights went a further step when in 1961 the International Commission of Jurists sponsored an African Conference on the Rule of Law, held in the Nigerian capital city of Lagos. What was significant about this gathering was that it was held before the independence of the majority of African states, but was nevertheless attended by African lawyers, not only from the Anglophone but also from the Francophone territories.²¹ The conference analysed many aspects of the concept of human rights and its relationship to African socio-economic conditions. The Resolution of the Conference, known as the "Law of Lagos", urged that:

"in order to give full effect to the Universal Declaration of Human Rights of 1948, this Conference invites the African Governments ~~to~~ study the possibility of adopting an African Convention of Human Rights in such a manner that the conclusion of this Conference will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse thereto be made available for all persons under the jurisdiction of the signatory states".²²

Unfortunately, in spite of the United Nations' encouragement to implement this resolution by the African governments, nothing has ever been effected in that regard.

However, what we have said above, with regard to the attitudes and responses of Africans towards the international and regional implementation of human rights as enshrined in the Universal Declaration, shows that even prior to the entrenchment of bills of rights in the constitutions of African independent states, respect for human rights had already been accepted by africans. Logically, therefore, when bills of rights were proposed for inclusion in the independent constitutions granted during the peak period of British decolonization in the 1960s, African leaders predictably responded favourably - and indeed in some cases the constitutional incorporation of fundamental rights and freedoms was at the nationalists' own request, as for example, in Nigeria and Zambia.

Having discussed the impact of the Universal Declaration on African attitudes towards respect for human rights, and its generation of a favourable human rights climate and enthusiasm in a predominantly pre-independent Africa, we should now examine the pertinent question of how the same directly or indirectly affected constitution-making in the emerging independent Africa - that is the question of the source of bills of rights in Commonwealth Africa.

B. The Universal Declaration as a Direct and Indirect Source of Bills of Rights in Commonwealth Africa

It is convenient to note briefly how the Universal Declaration influenced the constitutional protection of fundamental rights and freedoms in the Francophone African states. The normal practice in these states is that they list a number of fundamental

rights in their constitutions, and also incorporate by reference the Universal Declaration of Human Rights and the French Declaration of the Rights of Man and the Citizen (1789). The Constitution of the Republic of Chad, for example, proclaims in its preamble that:

"The people of Chad solemnly proclaims its attachment to the principles of democracy as defined by the Declaration of the Rights of Man and of the Citizen in 1789, by the Universal Declaration of 1948, and as guaranteed by the present constitution".²³

In fact, with respect to the Francophone states, it could be said that the rights of man in their constitutions have as their source the French Declaration of the Rights of Man and the Citizen of 1789, and the Universal Declaration of Human Rights (1948). Of course, the mode of protection is remarkably different from that adopted in Commonwealth African constitutions. In the ex-French dependencies the preambles to their respective constitutions are used not merely to recite the rights, but also to guarantee them - obviously an imitation of the practice of the mother country (France) which, in its constitutions of both the Fourth and Fifth Republics, adopted that method.

An interesting example within Commonwealth Africa of the incorporation of the principles of the Universal Declaration is found in the current Republican Constitution of Malawi (1966). The former British Protectorate of Nyasaland attained independence (under the new name of Malawi) within the Commonwealth in 1963 with a constitution which included a bill of rights, like most other British territories. When the country opted for a republican status under a single-party system of government in 1966, the bill of rights was rejected and in its place the Constitution declared, inter alia, that:

"The Government and People of Malawi shall continue to recognize the sanctity of the personal liberties enshrined in the United Nations' Universal Declaration of Human Rights, and the adherence to the Law of Nations".²⁴

The legal effect of this and other similar provisions in the Constitution of Malawi will be fully discussed later; here it suffices to note that this form of constitutional guarantee looks like a declaration of intent or objective which the government strives to achieve in relation to individuals. In fact, this was all that the Universal Declaration expected of those states who adhered to it.

But in Commonwealth Africa bills of rights were not adopted with the Declaration in view, rather the fundamental rights and freedoms in these countries were borrowed from the European Convention on Human Rights which, as indicated elsewhere, was itself inspired by the Universal Declaration. For the purposes of the ensuing discussion we should perhaps say something about the Convention, the relevant areas of difference between it and the Universal Declaration, and the extent to which bills of rights in Commonwealth Africa reflect its style of protection.

C. The European Convention on Human Rights

In relation to the adoption of the Universal Declaration, it has been indicated that its effect in generating both international and regional efforts in the promotion of human rights was profound. In the area of regional attempts to establish machinery for the implementation of some of the provisions in the Universal Declaration, there is no doubt that the adoption of the European

Convention of Human Rights in 1950 constituted the single most important event. The Convention was concluded by the members of the Council of Europe whose specific aim was the induction of "greater unity between its members". The conclusion of the Convention on human rights was thus seen as an essential component of the Council's general programme towards European unity, understandably against communist threat.

The European Convention had from its establishment, many advantages over the Universal Declaration, and it is precisely for this reason that the former has proved more successful in the implementational and operative sense than has been the case in relation to the Universal Declaration. Firstly, as Robertson has observed, the European Convention was classically a system of regional approach to the protection of human rights, and this approach has the advantage that it is easier for a group of like-minded countries in a particular region to agree on a common standard and accept a common system of control than it would be for a community of the world.²⁵ This proposition is also confirmed by the preamble to the Convention, which says that:

".....the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration....."²⁶

The second advantage which the Convention had over the Universal Declaration is implicit in the above statements in its preamble. It has been shown elsewhere in this part of our inquiry that the European conception of human rights embraces only the "traditional natural rights" of a political and civic nature. It is true that the four Protocols which were later signed by the High Contracting

Parties as "complementary" documents to the Convention, and more significantly, the signing of the European Social Charter of 1961,²⁷ social and economic rights are now recognized. But, as the Social Charter of 1961 expressly provides, the High Contracting Parties have only accepted these "as the aim of their policy, to be pursued by all appropriate means....."²⁸ The social and economic rights provided therein are therefore not susceptible to enforcement by the European Commission as are the civil and political rights which we have just discussed above.

The rights and freedoms in the European Convention, therefore, are really an assemblage of those values which have been identified as fundamental rights and freedoms of an individual as they were presented by the European political culture. On the other hand, the Declaration was an attempt to accommodate the two dominant world ideologies about the relationship of man and his political society, that is, between the socialist/communist ideology and the Western capitalist ideology. Thus, unlike the Declaration, the rights and freedoms in the European Convention are couched in an individualistic rather than in a collectivist ideology, e.g., "Everyone has the right to liberty", or "No one shall be held in slavery or servitude".

The above stated proposition is significant, because it explains why bills of rights in Commonwealth Africa, which were more or less an importation of the European Convention, failed to deal with the social and economic rights in the African constitutions, rather the rights therein reflected their orientation in the individualistic ideology. Such an approach to the protection

of human rights, which did not take into account the differing stages of social and economic conditions of poor nations, was bound to be opposed by the governments of those countries. This explains, at least in part, why bills of rights became unpopular in emergent Africa after independence. We discuss this subject in a later chapter on the impact of socio-economic factors on human rights in an emergent African state, taking Zambia as a case in point.

The rights and freedoms which are set out in Section I of the Convention are as follows:

- 1) The right to life.²⁹
- 2) Freedom from torture and inhuman treatment or punishment.³⁰
- 3) Freedom from slavery or servitude.³¹
- 4) The right to liberty and security of person.³²
- 5) The right to a fair trial.³³
- 6) Protection against retroactivity of the criminal law.³⁴
- 7) The right to respect for one's private and family life, one's home and one's correspondence.³⁵
- 8) Freedom of thought, conscience and religion.³⁶
- 9) Freedom of expression.³⁷
- 10) Freedom of assembly and association.³⁸
- 11) The right to marry and found a family.³⁹
- 12) The right to an effective remedy if one's rights are violated.⁴⁰
- 13) Freedom from discrimination in the enjoyment of the rights and freedoms set forth in the Propocol.⁴¹

14) The right to peaceful enjoyment of possessions.⁴²

15) The right to education.⁴³

16) The right to free election.⁴⁴

Practically all these rights and freedoms guaranteed by the system of protection under the European Convention are taken from the Universal Declaration (in fact 12 of the 13 rights and freedoms guaranteed in the Convention are taken from the Universal Declaration), although not copied holus-bolus. The improvement of the European Convention on the Universal Declaration in the protection of human rights lies in the fact that unlike the latter, the Convention was drafted with a view to attributing legal content to the rights guaranteed and with creating the necessary machinery for their supervision and enforcement. This meant that, unlike the Universal Declaration again, the signatory states to the Convention were put under legal obligation to abide by the Convention. Because of the legally enforceable nature of the provisions in the Convention, in the sense that they were intended to be enforced through a judicial process, the rights and freedoms under the Convention are stated in a more specific and precise manner characterized by qualifications specifying grounds on which the guaranteed rights and freedoms may be derogated from. Articles 8-11 and Article 1 of the Protocol allow derogation from the guaranteed rights and freedoms if the derogating measures are undertaken in accordance with law, and are necessary in a democratic society and in the interests of public good. Further, measures derogating from the fundamental rights and freedoms are allowed in time of war or other public emergency

threatening the life of the signatory state, provided that these measures are strictly required by the exigencies of the situation. But certain rights and freedoms cannot be derogated from even during a public emergency:⁴⁵ these are the right to life - save in the exceptional cases stated: freedom from torture or inhuman or degrading punishment; freedom from slavery or servitude; freedom from punishment for acts or omissions made criminal by retroactive legislation.

The scheme under the European Convention has been highly successful as an instrument for the protection of human rights,⁴⁶ and many cases have been dealt with by the European Convention Commission and the Court of Human Rights - the machinery set up for the implementation of the provisions of the Convention.⁴⁷

The principles of human rights set out under the European Convention found their way into Africa in two ways; viz., before independence by some of the African dependants through the extension of the Convention as prescribed in the Convention,⁴⁸ and through the adoption of a bill of rights based on the Convention in the independence constitutions of many ex-British colonies acceding to independence. These are discussed below.

D. Extension of the Convention to Non-Metropolitan Territories

i) Extension of the Convention during colonial rule

It is said that:

"in the minds of the promoters of the Convention, the collective guarantees of the fundamental rights of man were to have effect not only in the metropolitan territory of the member states of the Council of Europe, but also in their overseas territories and their colonial possessions".⁴⁹

The evidence for this is the existence of Article 63(1) of the Convention - otherwise called the "Colonial Clause". According to this clause, any state may at any time declare that the Convention shall extend to all or any of the territories for whose international relations it is responsible. And by Clause 3 of the same Article, upon the declaration of the extension to any territory, "the provisions of this Convention shall be applied in such territories with due regard.....to local requirements". This in effect means that the content of the application of the Convention to any territory is the matter to be determined by the state making that application, and may use this provision to exclude from its undertaking some rights defined in the Convention and in the Protocol. Admittedly, given the political and social realities of any colonial situation, a number of rights and freedoms stated in the Convention could not be made to apply without some serious modifications, since the Convention itself was ^{drafted} and made to apply within the context of the political, social and cultural situations of the European countries. Such rights guaranteed under the Convention, as the right to holding free elections at reasonable intervals under conditions giving rise to the free expression of the opinion of the people in the choice of the legislature; or the right to education and of respect of the right of parents to ensure such education and teaching in conformity with their own religious and philosophical

convictions; or freedom of expression; freedom from discrimination on grounds of race, colour, political or other opinions, cannot be executed fully within the context of colonial rule.

However, the Extension Clause in the Convention was used by the United Kingdom on October 23, 1953, to extend the application of the Convention and Protocol to forty-two of its overseas territories, including Northern Rhodesia (Zambia).⁵⁰

Interestingly enough, the ex-British colony of Southern Rhodesia was missing from the list of those British overseas territories to which the Convention was made to apply. The territory of Southern Rhodesia (now know as "Rhodesia" only) achieved the status of a self-governing colony in 1923, and in consequence of that secured to itself a considerable amount of internal autonomy. Vasak thinks that the omission of Southern Rhodesia from the list could be explained by the fact that being self-governing, the territory's government "ought to be, if it has not been, consulted before any extension of the Convention".⁵¹

But one would be entitled to ask the pertinent question - What effects, in fact, was the Convention expected to produce in the territories to which its application was extended? Did the gesture of extension mean, for example, that colonial persons could also invoke the judicial process established under the Convention to enforce any of the rights guaranteed thereunder in the event of any allegation of violation? Or did the extension simply mean that the state extending was required to take into account the provisions of the Convention

in their dealings with the colonial peoples, and further that if a breach of the Convention ever occurred, they could be called upon to account for it at the international level in terms prescribed by the Convention?

With respect to the first question posed above, two responses seem apt. In the first place, it is reasonable to say that in the political, social and educational conditions of the colonial peoples at the beginning of the 1950s, the practical value for which the Convention stood could not be made use of by them, and indeed it would not be out of place to say that even its existence was not known among the colonial subjects during this period, except by a handful who happened to be politically enlightened. This was one of the practical limitations of the Convention in its application to the colonial territories. The second limitation obviously related to the technical difficulties under the Convention regarding the rule of locus standi governing the lodging of complaints. Under the Convention only two sets of entities could set in motion the judicial investigation for the alleged violation with the European Commission of Human Rights, viz., by any of the contracting states petitioning against another state - or the so-called "inter-state petition", and secondly, by an individual claiming to be the victim of a violation of the Convention who lodges a petition against the state to whom the violation is attributed, or the so-called "individual petition".⁵² With respect to the "individual petition", "the High Contracting Party against which the complaint has been

lodged has.....[to] recognize the competence of the Commission to receive such petitions",⁵³ and as the UK had not recognized this neither a British subject proper nor a colonial subject in the territory to which the Convention had been extended could have access to the Commission. Access via the "inter-state petition" offered but a circuitous means of access to the Commission by a colonial subject. He could do this by approaching any of the Contracting Parties (of course, other than the state against which the complaint was directed) requesting it to lodge an application on his behalf against the allegedly infringing state. It is reported that this once happened against the United Kingdom ".....in February 1960", when ".....two African politicians of the African National Congress [of Nyasaland].....went to Iceland in order to ask the Icelandic Government to bring before the European Commission of Human Rights the detention, deemed to be contrary to the Convention, of Dr. Banda, leader of the Nyasaland Independence movement".⁵⁴ However, not much transpired from this "behind the door" technique of challenging the executive action of the UK servant in executing the detention order in a colonial territory, because when the Icelandic Government "was on the verge of lodging with the Commission against the UK", Dr. Banda had been released from detention, and this put an end to pursuance of this matter. However, this experience does register the fact that perhaps a colonial subject might use this method successfully to enforce certain provisions of the Convention if it has been extended to the territory in which he resides. But the legal issue might have

been brought out as to whether the Icelandic Government had sufficient interest in the matter surrounding the detention of Dr. Banda to justify its lodging and pursuing the petition on his behalf. Since the UK has recognized the "inter-state petition", the Icelandic Government, being a party to the Convention, had the capacity to cause another party to account for the breach of the Convention in its colonial territories, to which it had extended the application of the Convention.

However, the potency of the Convention in its application to the dependent territories lay in the fact that the United Kingdom has been observing its provisions whenever it undertook measures manifestly derogating from its obligations under the Convention. Article 15(1) and (3) of the European Convention, for example, provides that:

"(i) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligation under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law,

.....
 (ii) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again fully executed".

Pursuant to these provisions of the Convention reproduced above, the Acting United Kingdom Representative to the Council of Europe in Strasbourg, sent to the Secretary-General of the Council of Europe a note of information that in the Protectorate

of Northern Rhodesia, "in or about September 1956 a public emergency within the meaning of Article 15(1) of the Convention arose",⁵⁵ and in consequence of this:

"Certain emergency powers were brought into operation in the Western Province of the Protectorate of Northern Rhodesia on 11th September, in order to preserve the peace and prevent outbreaks of violence, loss of life and damage to property; for these purposes the Governor of the Protectorate of Northern Rhodesia, to the extent strictly required by the exigencies of the situation, exercised powers to detain persons which may involve derogations in certain respects from the obligations imposed by the Convention for the Protection of Human Rights and Fundamental Freedoms. However, there are at the present time no persons under the detention pursuant to these power".⁵⁶

It is true that at the time when this information was being furnished to the Secretary-General of the Council of Europe, no detentions were executed pursuant to the emergency regulations; however, soon after, a number of detentions were made pursuant therewith.

Article 15(3), as we have seen, also required that in the event of the withdrawal of measures derogating from the obligations under the Convention, this fact too must be communicated to the Secretary-General of the Council of Europe. Pursuant to this requirement when the declaration of emergency was terminated in Northern Rhodesia, the United Kingdom Permanent Representative to the Council of Europe communicated to the Secretary-General giving an account of the amount of damage done to persons and property occasioned during the emergency, and the nature of measures taken by the Governor and his senior administrative officers, and of the police. The note then ended by a reference to the question of compliance via the Convention in the following terms:

"As a result of the improvement in the situation in Northern Rhodesia, the Governor was able.....to revoke several of the Preservation of Public Security Regulations..... Accordingly, the UK has the honour to state that the provisions of the Convention are again being fully executed in the Protectorate of Northern Rhodesia".⁵⁷

In view of what has been recounted above regarding some aspects of what the Convention in its application to colonial territories⁵⁸ entailed, it is clear that the Convention exercised some practical influence in enhancing the content of political responsibility on the part of the UK Government towards dependent peoples. But of more significance for our present purpose is that the Convention was made applicable to dependent territories well before many of these territories had assumed the status of independent sovereign states. The next question was, upon assumption of that status by any or all of these colonial countries, Britain was to cease to be responsible for their international relations, and therefore the Convention would have ceased to apply to them at least through the way it did. In other words, the question was how best to retain the Convention in the constitutional system of the new independent states. It is important to stress the point that the provisions of the European Convention had their origin in the dependent territories during the colonial era, and that that era having gone in the 1960s, the question was merely one of adaptation to the situation created by the fact of independence.

ii) The Nigerian case⁵⁹

a) Origin

The incorporation of a full set of fundamental rights and freedoms in the Nigerian Constitution of 1959 was a ^{significant}

event in the constitutional practice of the British Commonwealth in the sense that the old attitudes against the constitutional protection of human rights were now being abandoned. As a result of this, practically all of the former British African territories which acceded to independence after the Nigerian experience took the example of including a bill of rights in the independence instrument. This fresh approach stood in sharp contrast to the pre-1959 one whereby the independence constitutions of, say, Ghana (1957) and Ceylon (1947), contained only a limited range of personal liberties and freedoms; the reason being that these constitutions were granted at the height of strong Anglo-Saxon pessimism towards constitutional guarantees of personal liberties.

The story of the origins of the decision to incorporate fundamental rights and freedoms in the Constitution of Nigeria has now been told in full.⁶⁰ However, suffice it to state here that the decision arose from the problems engendered by the federal nature of the territory's government, coupled with the tribalistic approach to politics by all the three major political parties in the country. Since 1914, when the Union of Nigeria was founded, and up to and beyond 1959, Nigeria had been divided into three regions. These included the Western Region, the Eastern Region, and the Northern Region. In terms of ethnic composition, each of these three Regions displayed the same outlook, which was that in each case there was a tribal group - Yoruba in the Western Region, Ibo in the Eastern Region, and Hausa-Fulani in the Northern Region; and around each of these

main tribes in each of these three Regions there was a cluster of minority tribes. More significantly, each of the tribal groups in their respective Regions controlled the political party in power. For example, the Yoruba in the Western Region controlled the Action Group; the Ibos in the East controlled the National Council of Nigeria and the Cameroons, and the Hausas and the Fulanis in the North controlled the Northern Peoples' Congress. The practical result of this structural arrangement of the country was to create a situation whereby the minority groups had no say or meaningful participation in the country's politics. Not surprisingly, tension quickly developed between the minority tribes and majority groups - the former making "allegations of discrimination, oppression, neglect and general maladministration" against the majority tribe-dominated regional governments"⁶¹ in the country. And certainly "discrimination in the distribution of social and economic amenities was evidently practised in varying degrees in all the regions".⁶²

In these circumstances two issues dominated Nigerian politics during the period before and during the Constitutional Conference of 1957, namely, devising some means of allaying minority fears of dominance and oppression by the dominant tribal groups, and secondly, the question of the creation of more regions in order to enfeeble certain regions which were grossly over-sized - like the Northern Region. At the Constitutional Conference held in London in May and June of 1957, where the above-mentioned issues were raised the

delegates were in favour of a proposal for the appointment of a Commission of Enquiry by the British Government. The Commission, fittingly called the Minorities' Commission, was appointed in 1958 under the chairmanship of Sir Henry Willink, "to ascertain the facts about the fears of the minorities in any part of Nigeria, and to propose means of allaying those fears whether well or ill-founded". The Commission, which reported in the following year, proposed that one means by which minority grievances could be solved was to include in the proposed Nigerian Constitution, provisions guaranteeing certain fundamental rights. In its often quoted words, the Commission argued that:

"Provisions of this kind in the Constitution are difficult to enforce and sometimes difficult to interpret. Nevertheless, we think that they should be inserted. Their presence defines beliefs widespread among democratic countries and provides a standard to which appeal may be made by those whose rights are infringed. A government determined to abandon democratic courses will find ways of violating them but they are of great value in preventing a steady deterioration in standards of freedom and the unobstructive encroachment of a government on individual rights. We have therefore considered what provisions might suitably be inserted in the Constitution and have given particular attention to the Convention on Human Rights to which, we understand, Her Majesty's Government has adhered on behalf of the Nigerian Government...."

These recommendations of the Minority Commission, together with other checks against the abuse of majority power, were accepted by the British Government and were used to form the basis of the draft constitution for Nigeria which was presented to the resumed Nigeria Constitutional Conference of September and October 1958 in London.⁶³ Although the original purpose

of this latter constitutional conference was to prepare a text constituting the Independence Constitution, the chapter relating to the human rights was promulgated even before independence on October 24, 1959⁶⁴ - that is to say, in time for the federal elections taking place on December 18, 1959. The reason for this was that the adoption of a bill of rights in the country was seen to be instrumental for a free conduct of electioneering campaigns by the political parties within Nigeria. Thus the human rights provisions were published as the Sixth Schedule to the Constitutional Order of 1954, but in the Independence Constitution of Nigeria, which came into force on October 1, 1960,⁶⁵ the provisions on fundamental rights and freedoms occupied one of the early portions in the Constitution, i.e., Chapter III of the Second Part of the Federal Constitution of Nigeria.

b) Content

One of the most notable features of the rights and freedoms which were written into the Nigerian Constitution was that invariably all of them were individualistic in formulation - quite naturally reflecting the European approach of confining only to the protection of what are often referred to as the "traditional civil liberties". It is here that the point must be made to the effect that what the Nigerian bill of rights did was to import into Africa the Western conception of human rights. The evidence for this is easy to adduce. The Nigerian Constitutional guarantees of rights were for the most part detailed on the precedent of the European Convention - indeed all except one or two provisions were taken almost word-for-word from the Convention.

Thus in examining the provisions of human rights set out in the Nigerian bill of rights of 1960, it is necessary also to indicate the source of each specific right in the European Convention, as specified in the footnotes. The rights guaranteed included:

the right to life;⁶⁶ the right to protection against torture and inhuman or degrading punishment or treatment;⁶⁷ the right to liberty and security of person;⁶⁸ the right to a proper administration of justice;⁶⁹ the right to respect for private and family life, home and correspondence;⁷⁰ the right to freedom of thought, conscience and religion;⁷¹ the right to freedom of expression;⁷² the right to freedom of peaceful assembly and association;⁷³ the freedom of movement;⁷⁴ the right to protection against discrimination;⁷⁵ and the right to compensation in the event of expropriation.⁷⁶

c) Form of guarantees

The Nigerian bill of rights did not only end at copying the substance of the European Convention, but also went still further to abstract the principles concerning the ways in which the guaranteed rights and freedoms could be derogated from. The bill of rights followed closely (albeit with minor differences in phraseology) the European Convention in specifying circumstances in which it was permissible for the State to pass laws deviating from the guaranteed rights.

C. Nature of Formulation

The European Convention through the Nigerian bill of rights has also played a significant role in influencing the manner in which bills of rights in Commonwealth Africa have been formulated. It is the Convention, for example, which supplied certain principles upon which the guaranteed rights and freedoms could be derogated from in the African bills of rights. Under the Convention, certain of the rights protected may have restrictions placed upon them by the authorities, but any measures of this sort must be as are prescribed by law and are necessary in a democratic society in the interests of national security, public safety or the economic welfare of the member state concerned, for the prevention of disorder or of crime, for the protection of health and morals and the rights and freedoms of others.⁷⁷

The principle stated above upon which some of the guaranteed rights and freedoms under the Convention, could be lawfully derogated from by the signatory authorities, was reproduced in the Nigerian bill of rights though differently put in terms of phraseology. Under the Nigerian bill of rights certain of the guaranteed rights and freedoms were also made to operate subject to curtailment by laws that were reasonably justifiable in a democratic society in the interests of defence, morality, public order, etc. The rights qualified in this manner were those relating to private and family life, freedom of conscience, of expression, assembly, association and movement.⁷⁸ The evident differing standards set by the Convention and the Nigerian bill of rights in respect of the grounds for permissible restrictions, has been best summarized by De Smith as follows:

"Under the European Convention the standard for laws restricting the guaranteed rights and freedoms is more exacting: they must be such as are 'necessary in a democratic society'. What is necessary and what is reasonably justifiable may be fundamentally different in a given situation, and it is obvious that the scope of judicial review envisaged by the Constitution is narrower than under the European Convention".⁷⁹

Thus, the concept of "reasonably justifiable in a democratic society" which was present in most of the neo-Nigerian bills of rights in Africa, traces its origins from the Convention, but its content, as De Smith asserts, imports that the African governments were given more scope in passing laws that may deviate from the sanctions imposed by the bill of rights. However, this principle has been the subject of active judicial scrutiny by the Zambian courts which have striven to find some criteria as to what is reasonably justifiable in a democratic society.⁸⁰ The determination of this principle in the Constitution has often posed ".....the greatest difficulty....." to the Courts, because ".....there are countries of greatly differing ideological character, all of whom claim that they are democracies".⁸¹ This topic is reserved for more intensive discussion in a later chapter on "Judicial Response", but suffice on this occasion to make the point that the bill of rights ought perhaps to have defined the intended meaning of such an imprecise term.

The other aspect of the formulation of rights which found their way from the Convention into African bills of rights, were the provisions relating to the proclamation of public emergencies. We have already referred to Article 15 of the Convention which provided for these. We have seen that under it, if a situation of war or other public emergency threatening the life of the nation

arises, the state concerned would be justified taking measures which may involve derogation from certain of the obligations under the Convention "to the extent strictly required by the exigencies of the situation...." But even in this situation, the authorities are not allowed to make derogatory measures with respect to certain rights and freedoms; the rights and freedoms excepted in this way are the right to life (but not in respect of deaths resulting from lawful acts of war); freedom from torture or inhuman or degrading treatment or punishment; freedom from slavery or servitude; and freedom from retroactive penal legislation.⁸² Similar provisions were adopted in the Nigerian bill of rights, except that under the bill emergency measures authorized by Parliament must be reasonably justifiable for the purpose of dealing with the emergency.⁸³ Moreover, derogations under the Nigerian Constitution were allowed only in respect of a few rights, namely, the right to life, liberty and security of the person; the right to a fair trial and to protection against discrimination. The declaration of a state of emergency was itself raised beyond judicial review the latter was limited to determining whether the procedures laid down in the Constitution for the declaration have been followed or not, and whether actions taken under emergency laws are reasonably justifiable to deal with the situation.⁸⁴ Emergency provisions of a kind contained in the Nigerian bill of rights were also to be found in practically all of the neo-Nigerian bills of rights,⁸⁵ although differences in drafting techniques and in other minor cases could be found. In Zambia, for example, it was the President who was to declare a public emergency,

or a declaration that a situation exists which, if it is allowed to continue, may lead to a state of public emergency.⁸⁶ The role of Parliament was one of approving the presidential declaration within a specified time, depending on whether it was sitting or not. Perhaps, of the Commonwealth African countries, Zambia offers a unique experience of the way the law relating to public emergencies have operated and their impact on personal liberties has been profound. This again will be the subject of a substantive chapter at a later stage. In their place of origin, especially in the UK, invocation of emergency laws has been almost unknown, and even when invoked it has been in indisputably grave situations, such as those created by war. The reason for this infrequent use of emergency powers in the developed democracies is obviously attributable to their political maturity and the fact of their long history of nationhood. Once transplanted in emergent societies with numerous areas of deep-seated divisions between the component groups, emergency laws have been seized upon by unscrupulous politicians to advance not always the purposes for which these laws were intended, but in order to achieve their own political ends.⁸⁷ The result has been the frequent incidence of emergencies in new nations - and as for Zambia, the country has been under a public emergency since independence in 1964. And on January 28, 1976, President Kaunda invoked "the full powers of the State of Emergency" following civil war in the neighbouring country of Angola in which Zambia was involved in some way. As the President explained, consequent upon the invocation, "the police and other wings of the security forces will with immediate effect apply in full all the powers under the

relevant laws relating to Emergency", and that "the full application of the State of Emergency means that fundamental rights and freedoms of individuals under Part III of the Constitution of Zambia will be affected".⁸⁸

D. Enforcement of the Guaranteed Rights

On this subject it could be said that the provisions relating to the enforcement of the protective provisions in the Nigerian Constitution and those that were patterned on it were original, at least in the sense that the European Convention did not provide any precedent in that regard. The Convention was in the nature of an international treaty rather than a national "bill of rights", and so it has its own set of institutions to enforce its provisions. It is quite obvious that the notion underlying the enforcement procedure in the Nigerian Constitution was drawn from the Western conception that the Courts are the traditional sanctioning institutions of justifiable controversies between individuals inter se, and those whereby the state is also a party. In particular, the Courts in the English and American constitutional systems are the established venues through which individual grievances relating to infractions of personal liberties have been ventilated. This classical role of the Courts as the guardian of the Constitution as a whole and individual freedoms in particular, was written into the Nigerian Constitution which provided that any person alleging contravention of the protective provisions in relation to him⁸⁹ in any territory of the Federation of Nigeria could apply to the High Court for redress. These provisions were also reproduced in all of the African neo-Nigerian bills of rights, though with some

substantial improvements in the technique of drafting.⁹⁰ In the Zambian Constitution, for example, the enforcement of protective provisions also contains a clause to the effect that if in any proceedings in any subordinate court any question arises as to the contravention of the guaranteed rights, that question would be referred to the High Court for its determination.⁹¹

And this procedure was utilized once in Zambia in the famous case of Patel v. Attorney-General for Zambia.⁹² The applicant in this case was being prosecuted for the criminal offence under the penal code and under the Exchange Control Regulations 1965, for an unauthorized act of exporting Zambian currency outside the country. The parcels suspected of containing currency had been opened, examined, and seized from the post office by the Customs officer who believed that the parcels contained money going outside Zambia in violation of the Exchange Control Regulations. While proceedings were going on in the Senior Resident Magistrate's Court, counsel for applicant challenged the act of the Customs officer in searching the applicant's correspondence and in seizing his property as being contrary to certain of the fundamental rights of the individual which were guaranteed by the Constitution. The Senior Resident Magistrate, pursuant to the Constitution, referred the matter to the High Court.

The question can again be asked here as to why, as we shall see later, the Courts in the African states have, in fact, failed to uphold and assert their constitutionally assigned duty to be "the sentinels" of fundamental rights and freedoms. The effect of the enforcement provisions in the constitutions was to empower the judiciary to interpret the constitution, and to strike down legislation or executive decrees which conflict with its provisions.

In spite of the fact that there were more bills of rights in the African continent than anywhere else, only one instance is reported whereby a court of a Commonwealth African state struck down a relevant portion of the legislation found to be repugnant to some constitutional right.⁹³ In Zambia, for example, in spite of the fact that the Courts have been presented with more than thirty-two occasions to review certain executive and administrative acts as to their constitutionality, in only about three of these instances have the Courts pronounced against the authorities.⁹⁴

A survey of the fundamental rights and decisions in Zambia and in some Commonwealth African jurisdictions in the latter part of this work shows the unwillingness of the Courts to intervene in the defence of the rights of individuals as against government actions. What is the explanation for what one commentator on one of the outstanding Zambian fundamental rights decision described as an illustration of "judicial self-imposed restraint or judicial passivism?"⁹⁵ The pertinancy of this question lies in the fact that unlike African judiciaries, those in the developed democracies of Britain and the USA, and also the Supreme Court of India, have shown a characteristic intransigency in asserting themselves as "the sentinels" of personal liberty. No doubt the authors of African independence constitutions had their minds fixed on the fact that the same amount of performance in relations to the enforcement of rights would be attained by the African judiciaries.

On the contrary, the tendency in the post-independence constitutional practice has been the initiation of deliberate measures by the governments to remove whatever constitutional fetters exist in

their way through constitutional amendments, or through the adoption of one-party states. A combination of these factors has affected the outlook and role of the judiciaries in the total scheme of the governments of new nations.⁹⁶ The Zambian experience is apt to illustrate the points raised above. In Zambia the provisions relating to detention and restrictions under the independence constitution contained very "noble" procedural safeguards intended to guard against the arbitrary use of security laws by the government.⁹⁷ As we shall see, this area of the bill of rights was the most affected by the many (twenty in all since independence)⁹⁸ of constitutional amendments so far passed. And the clear trend of these amendments has been in the direction of attributing more power to the executive in the administration of security legislations. This was quickly followed by an amendment⁹⁹ which swept away altogether the requirement that a special procedure should be invoked when amending the entrenched sections in the constitution, which included, inter alia, a bill of rights and the independence of the judiciary. The actual implementations of these amendments had, of course, far-reaching effects on the fundamental rights and freedoms - but the most affected area was the right to property. The government had a virtually free hand to acquire compulsorily private property on terms of compensation determined no longer by the Courts, but by the National Assembly.¹⁰⁰ The process of weakening the content of the bill of rights was further carried to another end by the introduction of a one-party state in 1973. This important constitutional event had the effect of introducing novel concepts relating to the political relationships

of state institutions in a manner that was deliberately intended to promote omnipotency of the ruling party and to erect the institution of presidency as the repository of almost all state functions. This has, in actual practice, meant "partyrization" of Parliament, trade unions, student unions, parastatal organizations - including institutions of higher learning, the civil service, the public service commission, the judicial service commission, and even the Courts themselves.

The position elsewhere in the Commonwealth African countries shows more signs of constitutional instability than otherwise. Of course, the manifestations of these instabilities vary from country to country, for others have experienced military takeovers, e.g., Ghana, Uganda and Nigeria; and others which have opted for a one-party government have not included bills of rights in their constitutions, like Tanzania and Malawi. Even in those countries where bills of rights have survived, the evidence shows that either they no longer command the authority of sacrosanctity in the constitutions, or in their practical administration, or they have been substantially modified as to affect their traditional character and potency as instruments of "constitutionalism". Similarly, the problematic orientation of African politics has rendered judicialism, "the practical instrument.....[of] constitutionalism.....and the best guarantee of the rule of law and therefore liberty"¹⁰¹ to operate, but on its lowest level.

In conclusion it could be said that these first two chapters introducing the concept of human rights and tracing its source,

development and the way it found its access in African independence constitutions, clearly lend a great deal of light about the nature of problems which have, and are, operating against an effective enforcement of human rights in new nations. We have endeavoured to show that the source of human rights lies in the political-philosophical traditions of the West and in the laissez-faire conception of the individual in society. We have further shown that the concept of human rights which underlined the bills of rights in African independence constitutions was that of European origin. The various independence constitutions of Anglophone Africa could, in fact, be considered as "packages" of the various instruments of democratic liberalism with institutions based on the Westminster model. The authors of these constitutions perceived that the institutions which had worked so well in Western democracies would also operate likewise in independent Africa. Thus, they reproduced such features of the Westminster-type of institutions as democratic methods of governance through the creation of parliaments chosen through competitive elections, parliamentary supremacy, cabinet government, multi-party system, free elections held at fixed periodic intervals, politically neutral zones like an independent civil service and an independent judiciary, a controlled executive; and in the case of the majority of African states, a constitutionally entrenched bill of rights.

It must be added here that independence constitutions were like negotiated treaties, and hence more of a product of ad hoc bargaining in London, which never, save in a few cases, reflected popular demands and manifestations of indigenous political culture. These constitutions were quickly accepted by the nationalist leaders, not because they

entirely agreed with their provisions, but in order to hasten the attainment of national sovereignty and the entrenchment of their own power. Once in power, the nationalist governments knew they could change the constitution to suit their likings and to suit local needs and also to tighten their control over the political system. As already indicated, most of these constitutions did not last long. The parliamentary system has since been discarded in some countries, or in others made subordinate to the executive or the only party in power, strong systems of central control have been developed, political opponents have been subjected to detention and restriction ordeals; there has been deliberate discouragement of judicial review; the civil service, trade unions, chiefly authority, student unions, and other private organizations have since been co-opted under the umbrella of government control, and most governments now control all major channels of information - newspapers, television, radio, cinemas, etc. These, together with many other manifestations of constitutional problems that we shall discuss, constitute the political climate in most of Africa south of the Sahara. In other words, what has happened in Africa is that the very apparatus which ought to support the enjoyment of individual rights and freedoms has been destroyed. Added to these human-induced factors are the problems peculiarly inherent in the socio-political organizations of African societies - ethical diversity of African communities impose the threat of national disunity to a newly created "national" state, existence of local antagonistic religious groups to the authority of the governments, the problem of minorities, and in the case of Zambia, its geo-political position in southern Africa, has had a direct

impact on the operation of certain personal liberties. Further, all of the countries with which this investigation is concerned, have experienced colonial rule for many years - 70 years in the case of Zambia. The colonial experience in the area of the protection of the civic and political rights has not been of any help to the independent governments, and in fact has handed over to new governments a tradition of ^{political arbitrariness} in administering the ex-colony and its dealings with the indigenous people.

In short, what this investigation purports to do in the chapters that follow is to analyze how the various political, economic, social, cultural, ideological, historical, etc., forces in Africa have operated to affect an effective protection of human rights in Commonwealth Africa, using Zambia as a specially referent case study.

NOTES

1. For more details on the worldwide influence of the Universal Declaration, see The Impact of the Universal Declaration of Human Rights, United Nations' Department of Social Affairs, 1951, pp.18-32. See also L.O. Adegbite, "African Attitudes on the International Protection of Human Rights", in Nobel Symposium 7, International Protection of Human Rights (Stockholm) 1967, edited by Eide and Scholl, pp.67-80.
2. Final Act of the Teheran Conference (A/Conf.32/41), p.37.
3. For a list of some of these treaties, conventions and declarations, see L. Sohn, International Protection of Human Rights (New York, 1973), pp.516-518.
4. The only significant exception to this trend of incorporating a bill of rights in the independence constitution, was Tanganyika (1961), and to some extent Ghana (1957). This will be the subject of some detailed discussion at a later stage in this work.
5. UNIP Declaration of Fundamental Human Rights, October 1960, found as Appendix II in the N.R. General Election, 1962, by D. Mulford (Nairobi, 1964), p.191.
6. Ibid., pp.191-192.
7. Resolution No.1(A) and (B), see Brownlie, Basic Documents on Human Rights, op.cit., pp.431-33.
8. Ibid.
9. Ibid. Note that Zambia was at this time a territorial unit of the Central African Federation which was also the subject of condemnation for its racial practices.
10. The Preamble to the OAU's Charter.
11. Article ii(e) of the Charter.
12. See General Assembly Res.No.1904 (XVIII) of November 20, 1965.
13. For a comprehensive analysis and comments on the Convention, see E. Schweib, "The International Convention of the Elimination of All Forms of Racial Discrimination", 15 ICLO, 996 (1966).
14. UN General Assembly Res.No.1514 (XV) of December 14, 1960.
15. Preamble to the Declaration on the Granting of Independence to Colonial Countries and Peoples.
16. Ibid., Article 2.

17. Ibid., Article 3.
18. Ibid., Article 5.
19. Ibid., Article 7.
20. Montreal Statement of the Assembly for Human Rights (New York, 1968) and reprinted in Journal of the International Commission of Jurists, No.1, pp.94-95 (June 1968).
21. The Conference was attended by 194 judges, practising lawyers and teachers of law from twenty-three African countries. Nine countries from other continents were also represented.
22. International Commission of Jurists, African Conference on the Rule of Law: A report of the Proceedings (Geneva, 1961), p.
23. Preamble to the Constitution of the Republic of Chad, April 16, 1962, available in A. Peaslee's Constitutions of Nations Vol.1 (1964), p.65. See also the Constitutions of Algeria (1963), Burundi (1962), Cameroon (1961), Dahomey (1964), Gabon (1961), Guinea (1958), Ivory Coast (1960), Mali (1960), Niger (1960), Senegal (1963), Togo (1963), Upper Volta (1960).
24. The Laws of Malawi, Revised Edition, Vol.1, Chapter 1, Section 2(III).
25. Human Rights in the World (Manchester, 1972), pp.158-61.
26. See Preamble to the European Convention: author's own emphasis.
27. See Ian Brownlie, Basic Documents on Human Rights, p.366, op.cit.
28. See Preamble to the European Social Charter 1961, for example, op.cit., p.367. See also the content of the rights provided under the Charter.
29. European Convention on Human Rights, Section I, Article 2.
30. Ibid., Article 3.
31. Ibid., Article 4.
32. Ibid., Article 5.
33. Ibid., Article 6.
34. Ibid., Article 7.
35. Ibid., Article 8.
36. Ibid., Article 9.
37. Ibid., Article 10.
38. Ibid., Article 11.

39. Ibid., Article 12.
40. Ibid., Article 13.
41. Article 14, and 5 of the First Protocol
42. Article 1 of the Protocol.
43. Appendix IV, Article 2.
44. Ibid., Article 3.
45. Article 15(2).
46. See generally J. Fawcett, The Application of the European Convention on Human Rights (Oxford 1963); also F. Jacobs, The European Convention on Human Rights (Oxford 1975); C. Morrison, The Developing European Law of Human Rights
47. For the necessary details on this subject, especially with regard to an account of cases handled by the European Convention Commission and the Court of Human Rights, see the authoritative works of J. Fawcett, Application of the European Convention on Human Rights (Oxford, Clarendon Press 1969); F. Jacobs, The European Convention on Human Rights (Oxford, Clarendon Press 1975).
48. See Article 63(1) of the Convention.
49. K. Vasak, The European Convention of Human Rights Beyond the Frontiers of Europe, ICLQ, Vol.12 of 1963, p.1207.
50. The list was as follows: Aden Colony, Bahamas, Barbados, Basutoland, Bechuanaland, Bermuda, British Guiana, British Honduras, British Solomons, the Channel Island (Jersey and Guernsey), Cyprus, Falkland Islands, Fiji, Gilbert and Ellice Island, the Gold Coast, Jamaica, Kenya, Gibraltar, Windward Isles, Leeward Isles, Federation of Malaya, Malta, Isle of Man, Mauritius, Nigeria, Northern Rhodesia, North Borneo, Nyasaland, St. Helena, Sarawak, Seychelles, Sierra Leone, Singapore, Somaliland, Swaziland, Tanganyika, Trinidad, Uganda, Zanzibar and the Kingdom of Tonga.
51. Ibid., p.1210.
52. See Article 25.
53. Ibid.
54. The case is cited by K. Vasak, op.cit.
55. See Notes Verbales of August 16, 1957, Yearbook of the European Commission of Human Rights (Strasbourg), p.51.
56. Ibid.

57. Note Verbale of November 16, 1962, Yearbook of the European Convention on Human Rights, pp.8-10.
58. The British Government also invoked Article 15 of the Convention in connection with the following territories: Aden Colony, Cyprus, British Guiana, Kenya, Malaya, Nyasaland, Uganda, Singapore and Zanzibar: see Vasak, op.cit.
59. On this subject an attractive number of works have already been done. See, for example, S.A. De Smith, The Commonwealth and its Contributions (London, 1964), Ch.5, esp. pp.177-202; D.V. Cowan, The Foundation of Freedom (Oxford, 1961), Ch.6 generally; G. Ezejiozer, op.cit., Chs. 7 and 8; K. Vasak, op.cit., pp.1215-1221.
60. See Ezejiozer, op.cit., pp.178-183; also De Smith, op.cit., pp.177-180.
61. See Nwabueze, Constitutionalism in the Emergent States (London, 1973), p.114.
62. Ibid.
63. Cf. Report of the Resumed Nigerian Constitutional Conference, Cmnd. 569, pp.3-9.
64. Federation of Nigeria, Official Gazette, Vol.46, No.66.
65. The Nigeria (Constitution) Order in Council 1960, S.1, 1960, No.1652.
66. Article 17, cf. Article 2 of the Convention.
67. Article 18, cf. Article 5 of the Convention.
68. Article 20, cf. Article 5 of the Convention.
69. Article 21, cf. Article 6 of the Convention, see also Article 7 of the Convention.
70. Article 22, cf. Article 8 of the Convention.
71. Article 23, cf. Article 9 of the Convention. Note too that paras. 2 and 3 appear not to have originated from the Convention but bear similarities to the Constitution of Pakistan, Article 13, paras. 1 and 2.
72. Article 24, cf. Article 10 of the Convention.
73. Article 25, cf. Article 11 of the Convention.
74. Article 2b. Note that this is one of the freedoms which did not come from the Convention, but there are similarities with Article 9, para.d of the Constitution of Malaya.

75. Article 27, cf. Article 14 of the Convention.
76. Article 30, cf. Article 1 of the Protocol to the Convention.
77. Cf. Article 8 of the Convention, and also see Articles 9, 10 and 11.
78. Cf. Articles 22, 23, 24, 25, and 26 of the Nigerian Constitution, 1960, op.cit.
79. De. Smith, op.cit., p.189.
80. See Kachasu v. Attorney-General for Zambia (1969) ZLJ 44; compare with the proposition of J. Magnus in Patel v. Attorney-General for Zambia (1969), ZLJ 49.
81. Per J. Magnus, op.cit., p.65 in Dr. Gupta's Administrative Law, Zambian Cases and Materials, UNZA.
82. See Article 15(2)
83. Section 28(1) of the Nigerian Constitution, op.cit.; for a full account of the provisions in a period of emergency see G. Ezejiozer, op.cit., pp.185-88, and also De Smith, op.cit., pp.191-93.
84. See Williams v. Majekodurmi, FSC 166/1962.
85. See, for example, the Constitution of Zambia, Section 29, of 1964.
86. See Section 29(1), ibid.
87. For a detailed discussion of the frequent incidence of emergencies in new nations, see Mwabueze, Constitutionalism in the Emergent States, op.cit., Ch.VII.
88. President Kaunda's Address to the Nation, delivered on radio and television, January 28, 1976, Government Printer, Lusaka, p.1.
89. See Olawoyin v. Attorney-General of the Northern Region (1961), 1 All NLR 269; also Steele v. Attorney-General (1967-68), ALR Sierra Leone 1 at 13 (Sierra Leone SC), and also Nkumbula v. Attorney-General for Zambia (1972), CAZ Appeal No.6 of 1972.
90. Compare, for example, Section 28 of the Zambian Constitution (1964) with the Nigerian provisions on this matter.
91. See Section 28(3) of the Constitution.
92. Ibid.

93. Ibingira v. Attorney-General for Uganda (1966),
EA 306.
94. In William Chipango v. Attorney-General for Zambia;
Gilbert Mutale v. Attorney-General for Zambia.
95. Mohammed Zafer, "^{Kachasu} Case", Zambia Law Journal, Vol.1,
No.1 (1969), pp.44-48, at p.48.
96. See Claire Palley, Rethinking the Judicial Role, ZLJ, Vol.1
(1969), pp.1-35.
97. See S. 26 of the Independence Constitution, 1964.
98. J. Mwanakatwe, National Assembly Debates, Col.113, 1975.
99. Constitutional (Amendment) Act, Section of 1969.
100. See the Lands' Acquisition Act, 1970.
101. B.O. Nwabueze, Judicialism in Commonwealth Africa (London, 1977),
p.xi

CHAPTER 3THE PROTECTION OF HUMAN RIGHTS UNDER COLONIAL RULE

The relevance of the study of the colonial constitutional system and practice in relation to human rights in post-independence Zambia can easily be appreciated. At independence in 1964, although the handing over of the reins of government by the colonial regime to the nationalist government involved the withdrawal of most of the colonial officials, the institutions of government, administrative practices and procedures nevertheless remained substantially the same. For example, all the extensive powers of the Governor under the colonial constitution devolved on the President at independence; all the laws passed during the colonial time continued in force after independence until repealed by Parliament;¹ the National Assembly established at independence merely succeeded the Legislative Council of the colonial period, and inherited its procedures; the cabinet instituted at independence exercised the functions which were performed in the colonial period by the Executive Council. In these circumstances, the traditions left by the colonial regime of how to run the government and its administrative practices were inevitably of some immediate importance to the nationalist leaders who took over responsibility for the government of the territory. The colonial government's attitudes and practices in relation to the protection of personal liberties, the freedom of expression, of association and assembly, freedom of movement, freedom against discrimination, etc., was vital to the nationalists because these were the attitudes and practices which were most likely going to be adopted by the African leaders. A study of the extent to which individual rights and freedoms were protected during the colonial period would serve to inform us of the background

against which the post-independence task of effectively protecting fundamental rights and freedoms can best be appraised and understood.

A. Some Historical Antecedents²

Like other former colonial territories in Africa, the geographical unit now called Zambia was created by the European partition of Africa in the late nineteenth century. Although there are records to indicate that the Portuguese explorers and traders were the first Europeans to enter present-day Zambia, the country's real contact with the western world was brought about by the pioneering work of the Scottish missionary, Dr. David Livingstone. Between 1851 and 1872, this intrepid explorer had travelled through many parts of Central Africa, especially through Zambia where he subsequently died in 1873 at Chitambo village in the central province of the country. The town of Livingstone, near the Victoria Falls, was named after him and the Falls were named by him in honour of the reigning British Queen.

Livingstone's experiences led him to believe that Europe, and especially Britain, could play a big role in changing the backward circumstances of Central Africa and in improving the social conditions of its peoples. His initial task in securing Britain's intervention in Central Africa was one of supplying scientific information about that area with a view to generating enthusiasm among British politicians, fellow missionaries and missionary organizations, and commercial interests. The idea was one of inducing certain categories of Europeans to come to the area to improve its social and economic outlook. It is important to

emphasize that Dr. Livingstone was "a spokesman both of Christianity and of the Industrial Revolution".

Livingstone's work in Central Africa and his appeal for intervention in the name both of the Christian gospel and of modern commerce, came at the right time. Europe was at the height of its industrial advance as expressed through the Industrial Revolution. For this revolution to succeed, Europe needed a variety of raw materials such as cotton, rubber, minerals, etc., to feed its industries, and these materials were needed in larger quantities than was the case before.

The changed pattern of economic life in Europe engendered by the Industrial Revolution soon produced rivalries among European powers as to what overseas areas each power needed for the purpose of extracting raw materials. European powers soon started to lay their hands on Africa with claims and counter-claims for territorial possessions. It was precisely for this reason that in 1884 Bismarck, the German Chancellor, arranged a conference of European powers to try and reach a basic understanding about what was later to be called "the scramble for Africa". The Berlin Conference which took place in 1885, concentrated its efforts on drawing boundaries within which the European powers concerned were to be allowed to operate.

At the Berlin Conference, Britain displayed a uncharacteristic indifference to the acquisitions of any more territories in Africa, principally because of the recognition by the House of Commons that any such further territorial ambitions would involve financial

burdens on the Treasury in administering new colonies. But at the same time Britain realized full well the advantages to be derived from maintaining her influence over certain areas in Africa for the purpose of supporting industries at home. Seen in the wider context, all European countries in fact tended to take active steps to protect the interests of their own traders and manufacturers against those of rival countries. This in practice meant that each of the interested European powers had, in effect, to control those areas where its own trade and industry were most involved. Britain could not therefore have afforded to stay aloof in the face of these prevailing economic realities in Europe.

In the meantime, by the turn of the nineteenth century, British commercial traders had already settled in the southern part of Africa, in what is now called South Africa and Rhodesia, and had their eyes focused on the territories north of the Zambezi River,³ that is, the territories of Zambia and Katanga of the Congo. As a result of these developments, Britain was compelled to come to the aid of her traders and to protect them in some tangible way, which in effect meant extending her sphere of influence over the areas concerned. The most attractively economic way for Britain to run overseas territories and at the same time ensure her economic interests in these areas, was by granting Charters of Incorporation to trading companies with administrative provisions by which the traders themselves would assume the administrative responsibilities, with the financial responsibilities which this would entail. This is the approach which Britain adopted in extending her influence over various regions in West and East Africa and earlier on in

India. Indeed, British India originated in the enterprise of the East India Company, just as imperial expansionism in East Africa was facilitated by the activities of the British East Africa Company.

Similarly, in Central Africa, British influence, and finally the establishment of imperial rule, were the result of the enterprise of the British South Africa Company (the BSA Company).

The driving force behind the founding of the BSA Company was Cecil John Rhodes, from whom the name "Rhodesia" (i.e. Northern Rhodesia and Southern Rhodesia) was derived. Cecil Rhodes, at the time with which we are dealing, was already an established figure on the Kimberley diamond fields of South Africa; and he exercised a tremendous influence in the politico-commercial circles of the emerging community of traders and businessmen in South Africa and in Rhodesia.

Rhodes' political and commercial doctrine was that the future of British South Africa lay in the acquisition of territories north of the Limpopo River. Behind this idea of "northward expansionism" was the belief that there was an enormous mineral wealth of gold, diamonds and copper which could be placed under the control of the BSA Company. But at the same time, Rhodes was fully aware that his ambition to extend control over the mineral wealth of the North could not be realized without the protection of the British Government.

The only way in which Rhodes imagined implementing his "northward" policy was to initiate a programme whereby, through his agents and in the name of the British South Africa Company, he

could conclude some agreements with the most powerful African chiefs so that permission could be granted to undertake commercial activities in the areas concerned. In the event, Rhodes sent emissaries to seek concessions from African chiefs. The first of such concessions was achieved in 1888, when King Lobengula of the Ndebale granted to C.D. Rudd (Rhodes' partner in the diamond business), a concession conveying the monopoly of the mineral rights throughout his territory to the BSA Company.⁴ The Rudd Concession, as it was known, became the first real basis of the British South Africa Company.

i) The British South Africa Company

Having secured this concession, Rhodes, in partnership with other traders, proceeded now to approach the Crown for the Charter of Incorporation for a company to acquire and work these concessions. The only reaction from the British Government was its insistence on ensuring that the incorporation must clearly place the company under British control instead of leaving it on its own. A letter of May 16, 1889, written by direction of Lord Knutsford, then Secretary of State for the Colonies, shows the British Government's mind on the question of the company's incorporation. The Secretary of State commented thus:

".....I am to observe that, in consenting to consider this scheme in more detail, Lord Knutsford has been influenced by the consideration that if such a company is incorporated by the Royal Charter its constitution, objects, and operations will become more directly subject to control by Her Majesty's Government than if it were left to these gentleman to incorporate themselves under the Joint Stock Companies Act, as they

are entitled to do. In the latter case, Her Majesty's Government would not be able effectually to prevent the company from taking its own line of policy, which might possibly result in complications with Native Chiefs and others.....⁵

The British Government's position having been clarified with respect to the character and kind of company it was willing to support, the South African commercial businessmen under the leadership of Cecil Rhodes, not having objected to the British Government's views, submitted a formal petition on 13th July 1889, for the Charter to the Imperial Government. The petition expressed these gentlemen's ideas and intentions behind the request for the incorporation of a company. For example, the petition set forth:

"That the existence of a powerful British Company, controlled by those of Your Majesty's subjects..... would be advantageous to the commercial and other interests of Your Majesty's subjects in the United Kingdom and in Your Majesty's colonies".

Further:

"That Your Majesty's Petitioners desire to carry into effect divers concessions and agreements which have been made by certain of the Chiefs and tribes inhabiting the said region,.....with the view of promoting trade, commerce, civilization, and good government.....in these territories...."

And more significantly, the petition concluded with these remarks:

"That Your Majesty's Petitioners believe that if the said concessions, agreements, grants, and treaties can be carried into effect, the conditions of the natives inhabiting the said territories will be materially improved and their civilization advanced, and an organization established which would tend to the suppression of the slave trade in the said territories being opened to the immigration of Europeans, and to the lawful trade and commerce [with] other nations".⁶

It would thus be seen that the petitioners based their argument for the incorporation of the company substantially on the ground that once formed such an establishment would advance the material welfare of the natives, and would help create conditions conducive to the securing of their basic "freedoms" of a social and economic character. It was in this context that the British Government replied with an unequivocal "yes" to the request of the petitioners, with the announcement that the Crown, "being satisfied that the intentions of the petitioners are praiseworthy and deserve encouragement, and that the enterprise in the petition described may be productive of the benefits set forth therein", constituted and incorporated the British South Africa Company.⁷ And when the company was finally incorporated, the Preamble to its Charter recited the intentions of the petitioners - namely (i) to establish British ascendancy in South Central Africa; (ii) to develop potential wealth in that part of Africa, and (iii) to raise the lot of its native inhabitants.⁸

In incorporating the BSA Company, the Imperial Government was in no doubt influenced by "the example of the Imperial East African Company", which showed "that such a body may to some considerable extent relieve Her Majesty's Government from diplomatic difficulties and heavy expenditure".⁹ And Dougal Malcolm, Director of the BSA Company since 1913 and its President since 1937, wrote that "avowedly Her Majesty's Government granted it (i.e. the Charter) because by this means it was thought that the British influence could best be

extended over the regions of Africa concerned with the minimum of risk, responsibility, and expense to the Crown".¹⁰

The original Charter of the British South Africa Company of 1889 did not include the regions north of the Zambezi, which were the target of Cecil Rhodes and his partners. The principal areas of operations contemplated in the original Charter were "the region of South Africa laying immediately to the north of British Bechuanaland, and to the north and west of the South African Republic, and to the west of the Portuguese dominion".¹¹ This meant that the territory which was to become Northern Rhodesia and which formed a major portion of the territories north of the Zambezi, fell outside the jurisdiction of the company. The anomaly was rectified in February 1891, by a supplementary agreement secured by the Company extending its field of operations to the north of the Zambezi.¹² Increasingly under the supplementary agreement Nyasaland was expressly excluded from the "field of operations".

By Article 3 of the Royal Charter, the BSA Company was ".....authorized and empowered.....to acquire by any concession, agreement, grant, or treaty....." any territories, lands, or property in Africa for its own commercial purposes or ends.

Armed with this legal authority, and assured of British protection, Rhodes now embarked on a more enterprising programme of obtaining agreements or treaties from the Chiefs of the northern territories so as to ensure the commercial monopoly of his company in those territories. In 1890 he despatched a number of emissaries to obtain concessions from all the

principal Chiefs of the northern territories as far as Katanga. Alfred Sharpe and Joseph Thompson covered the areas of Blantyre, south of Lake Nyasa and along the borders of the Congo Free State. A number of treaties resulted from this expedition from various Chiefs and headmen of these regions. Joseph Thompson, for example, collected treaties from the Chiefs of Bisa, Aushi, Lamba, Lenje and Lala tribes.¹³ The combined work of Sharpe, Thompson and Lochner in obtaining concessions from the African Chiefs on behalf of the Company, which concessions were formally accepted by the Crown in terms of the Royal Charter, "broadly defined the limits of the present territory of Northern Rhodesia (Zambia)".¹⁴ Of much importance to the present study was the work of F.E. Lochner, who was sent to Barotseland to conclude a treaty with King Lewanika of the Lozi tribe.

ii) The Lochner concessions of 1890

The treaty which was signed between Lochner on behalf of the British South African Company, and King Lewanika in 1890, was "by far the most important treaty¹⁵ with Africans concluded by the company in Northern Rhodesia", and it is this treaty that subsequently became the basis of the Company's claim to the mineral wealth of Zambia for a period of about seventy years.

By the terms of the treaty, the BSA Company obtained "the sole absolute and exclusive perpetual rights and power" to carry on certain commercial activities, and more important, to work out diamond, gold, coal, oil and all other precious stones, minerals or substances in the territory of Barotseland.¹⁶

The Company was also given administrative rights to deal with and adjudicate upon all cases between white men and between white men and natives, except that cases between natives were left to the King to deal with and dispose of.¹⁷

In return for these concessions, the Company undertook to protect King Lewanika and his nation from outside interference. In the second place, the Company further agreed to aid and assist in the education and civilization of the native subjects of Lewanika by the establishment and maintenance of schools and other institutions. The King was also to receive an annual royalty of £2,000 which was reduced to £850 in 1900 when the land and mineral concessions were ratified. King Lewanika was also obligated to assist the Company in its endeavours to suppress slavery and witchcraft.

It will be noticed that the contents of the treaty and matters thereby dealt with, have as their basis the Charter of the Company. In fact, it was provided in this agreements that:

"this concession shall not be deemed to confer upon the British South Africa Company any rights inconsistent with the provisions of the North-Western Rhodesia Barotseland Order in Council.....or with the Charter of the British South Africa Company or with any supplemental Charter which has been or may hereafter be granted to the company".¹⁸

Further, none of the privileges which were conferred on the Company could be alienated by the Company without the prior consent of the British Government. The only condition excepted from this was that the Company could alienate the rights to search for, digging and working out minerals to third persons.

These provisions purport to tie the agreement to the Charter of the British South Africa Company so that if anything in the agreement was found inconsistent with the Charter, it was to be treated as null and void. Further, the administration of the agreement by the Company was made subject to imperial control as a means of checking the activities of the company in relation to the native chiefs and native subjects.

But did the agreement constitute a treaty under the principles of international law, and in any case, how valid were "treaties" of this character? A treaty under international law can only be reached between or among subjects of that law. In the Lawanika-BSA Company relationship, it could be seen that Lewanika, being an African Chief, was recognized as a competent local sovereign to sign treaties. But as for the company, it was clear that it was not competent to conclude a treaty by itself, because it lacked subjectivity under international law. Under the United Kingdom Law (i.e., through the Charter of Incorporation itself), it is true that the Company had power to negotiate for concessions. But the Company's power in this respect was subject to the signification of the UK Government. This means that the Agreement could become a binding treaty in international law only if ratified by the United Kingdom as a sovereign state; the parties to it would then not be King Lewanika and the BSA Company, but Lewanika and the UK Government (although in practice it would really be the Company as an agent of Her Majesty's Government, which would be involved in the administration of the treaty). The Company itself had no

locus standi in international law. As to the questions on the validity of the Agreement as the basis for giving away the entire natural resources of the country to the Company, this will be discussed appropriately in a later chapter (on human rights and economic development Zambia), especially in the light of the fact that the Agreement was of great significance at and even after the independence of Zambia: for any property rights already created under the Agreement and still existing at the time of independence were entrenched in the independence constitution.

iii) The company government

25 For a period of about ~~25~~ years, the government of Northern Rhodesia was placed in the hands of the British South Africa Company. The Company's power of direct administration became operative on June 30th, 1895. However, by this time British jurisdiction over the territory was not fully acquired under the Foreign Jurisdiction Act, 1890, until Orders in Council were promulgated in 1899 and 1900, called the North Western Rhodesia Order in Council and the North Eastern Rhodesia Order in Council, respectively. These Orders in Council provided specifically for the exercise of "Her Majesty's jurisdiction in Northern Rhodesia for the administration of justice, the raising of revenue, and generally for the peace, order and good government of all persons therein". It could thus be said that from 1899 to 1924 (when the Imperial Government took over the administration

of Northern Rhodesia) there were three legal instruments which formed the constitution of the company administration. The first was obviously the Company's instrument of incorporation, that is the Charter itself from which the powers of the Company were derived. Secondly, the two Orders in Council extending imperial authority to the territory in 1899 and 1900 constituted a second constitutional basis for the Company's administration because in the words of the North Eastern Order in Council, "the powers conferred upon the Company by this Order are in augmentation of the powers conferred upon it by the Charter". In 1911, there were some constitutional changes in that the two separate regions, i.e., North Eastern Rhodesia and North Western Rhodesia, which had been administered separately, were merged into one territory with one government. The legislation which provided for the amalgamation of the two regions into a single protectorate was the Northern Rhodesia Order in Council 1911, which also made provision for the appointment of the administrator who was administratively responsible to the High Commissioner of the Union of South Africa.

B. Safeguards against the Abuse of Power under the Company's Constitution

Thus, from the beginning the Imperial Government intended the BSA Company to run its affairs under supervision from Whitehall. The Imperial Government considered the Company to be its principal instrument in the colonization of the regions of Central Africa,

and therefore the Company was expected to be bound by the authority of its "principal", that is His Majesty's Government. In the colonial territories it had acquired before and during this time, Britain was principally concerned with the interests of natives and how best to safeguard these in some definite legal manner. Therefore, when the legal framework for the Company's administration was being devised, the question of the preservation of native interests and ways of checking arbitrariness and abuse of power by the Company administrators loomed high in the mind of the Imperial Government.

In the event, two mechanisms were included in the Company's principal legal instruments by which to check arbitrary administration and ensure the prevalence of the interests of natives. Firstly, a wide range of the Company's legislative and administrative powers were made exercisable subject to the ultimate supervision of the Secretary of State for the Colonies acting on behalf of Her Majesty's Government. Secondly, within the Company's Charter and in both the the North Western Rhodesia and North Eastern Rhodesia Orders in Council, and in the Northern Rhodesia Order in Council after 1911, certain built-in safeguards were included which prohibited the Company from acting arbitrarily with regard to the traditional ways of life of the indigenous people.²⁰

i) Protective provision under the Charter"

The Charter, being an enabling instrument of the Company, conferred on the Company the power for the general administration of the territory, that is the "powers necessary for the purposes of good government and the preservation of public order",²¹

provided that the exercises of these powers were "in accordance with the terms of the Charter and the provisions of the Orders in Council".²² In any case, practically all of these general powers of administration conferred on the Company were made exercisable subject to the approval of the Secretary of State for the Colonies. Thus all concessions or agreements entered into between the Company and any African chief were to be examined and approved by the Secretary of State, who could also vary their conditions.²³ He was also made the arbiter in any differences arising between any native chief and the Company, and the latter was to be bound by his decision in the matter.²⁴ Any dealings of the Company with any foreign powers were subject to the approval of the Secretary of State.²⁵ The Secretary of State was also given the right to object or dissent from any system of the Company relative to the peoples of the territory in respect of slavery or religion, or the administration of justice. In that event, the Secretary was to make known his objection or dissent, and his directions on the matter were to be obeyed by the Company.²⁶

But perhaps the most important weapon of imperial control was the reserved power of the Crown to review the Charter after 25 years from its inception, and at the end of every succeeding period of 10 years. By virtue of this right, the government could "add to, alter, or repeal any of the provisions" in the Charter.²⁷ The "reservation"

provision should also be read together with the provision conferring on the Crown the right to terminate the Charter in the event of the Company not fulfilling its engagements.²⁸ By this provision, if the Crown was satisfied that "the Company has substantially failed to observe and conform to the provisions of [the] Charter, or that the Company is not exercising its powers under the concessions, agreements, etc....," it was lawful for it to terminate the existence of the Company.

The most notable way of imposing restrictions on the power of the Company administrators was through the express entrenchment of certain individual rights and freedoms in the Company's constitutional instruments. The Company's Charter, for example, expressly prohibited the slave trade and slavery;²⁹ it guaranteed freedom of religious worship by natives, except as may be necessary in the interest of humanity;³⁰ and natives were free to apply their local laws and customs.³¹

But the Orders in Council went further than the Charter in seeking to provide against any possible abuse of power by the Company administration.

iii) Protective provisions under the Orders in Council

We have already indicated that Northern Rhodesia was initially partitioned into two regions for the purposes of its administration by the chartered company. The two regions were the North Western Rhodesia (i.e., Barotseland) and the North Eastern Rhodesia, and

these regions were governed by separate Orders in Council which were not necessarily identical in content. In many respects the style of administration adopted in each of these regions was different, and the degree and extent of imperial control in each region assumed a different level.

The main reason for the difference, however, was that in North Western Rhodesia a fairly strong African State of Barotseland under King Lewanika was already in existence, and its recognized position vis-a-vis the Company was explicitly sanctioned by the treaty rights already referred to. The Land and Minerals Treaty of 1900, for example, entered into between King Lewanika and the BSA Company provided that the latter was "not to interfere in any matter concerning the King's power and authority over any of his own subjects".³² The effect of this was obviously to leave the Lozi traditional government intact, free from any large measure of interference by the Company or by the imperial government. Because of the existence of an efficiently organized system of government in Barotseland, the suppression of slavery proved effective and also because it was one of the obligations put on King Lewanika in the treaty between him and the Company that he was to assist the Company in the suppression of slavery.³³

Perhaps for these reasons the North Western Rhodesia Order in Council was quite short (19 articles only) compared with the North Eastern Rhodesia Order in Council (with 51 articles).

Unlike the political circumstances prevailing in North Western Rhodesia when the Company assumed the reins of government, there was never an efficient system of tribal administration in existence in North Eastern Rhodesia, and conditions there were politically chaotic. The slave trade between stronger tribes and the Arabs from the eastern coast of Africa were frequent. The Company and the Crown government perceived that what was required in these circumstances was a strong government under the Company, ultimately controlled by the Imperial Government. In the second place, the Imperial Government wanted to see North Eastern Rhodesia develop as a protectorate alongside Nyasaland. In fact, North Eastern Rhodesia was formally linked with Nyasaland in that the High Commissioner of Nyasaland was simultaneously the legislative authority of North Eastern Rhodesia.³⁴ On the other hand, North Western Rhodesia was attached to South Africa since the High Commissioner of South Africa was also the legislative authority of North Western Rhodesia.³⁵ The High Commissioner for South Africa could make proclamation to provide for the administration of justice, for the raising of revenue, and generally for the peace, order, and good government, and for the prohibition and punishment of acts tending to disturb the public peace³⁶ in North Western Rhodesia. And in the exercise of his legislative authority, the High Commissioner was to "respect any native laws or customs by which the civil relations of any native chiefs, tribes,

or the protected persons are governed".³⁷ However, the Imperial Government retained its checking power of disallowance through the Colonial Secretary.³⁸

The North Eastern Rhodesia Order in Council was far more elaborate on the protective provisions shielding natives from the Company's possible maladministrative practices. In the first place, the North Eastern Order in Council established thorough administrative organs. The administration was to be conducted by an administrator appointed by the Company and approved by the Secretary of State.³⁹ The administrator was to be assisted by an Executive Council. The administrator, with the concurrence of the Council, was vested with power to legislate for the administration of justice, raising revenue, and generally for peace, order and good government. A police force was established,⁴⁰ and a High Court of North Eastern Rhodesia created with full jurisdiction in civil and criminal matters.⁴¹

In such civil and criminal matters the law to be applied was English law, and the procedure and practice to be observed were those obtaining before Courts of Justice and Justices of the Peace in England.⁴² Even at the earliest stage, judicial security of tenure was given express recognition. Thus every judge of the High Court was to be appointed by the Secretary of State on the nomination of the Company, and:

"Shall hold office during good behaviour, and shall only be removed by a Secretary of State. The salaries of the judges... shall not be increased or diminished without his [the Secretary of State's] approval".⁴³

Appeal from the High Court lay with the Privy Council in London.⁴⁴ The hierarchy of the judiciary was completed by the fact that lower courts, below ~~of~~ the level of the High Court, were also established.⁴⁵

But more strikingly important were the substantive protective provisions under this Order in Council, which were spelled out in very clear terms. All of these resemble very nearly the present-day principles underlying the concept of human rights. In the first place the Order in Council provided against discrimination by enacting that no conditions, disabilities or restrictions were to be imposed upon natives save in respect of fire-arms, ammunition, liquor or any matter authorized by the Secretary of State alone.⁴⁶ And the Company was obligated to assign to the natives of the region "land sufficient for their occupation.....and suitable for their agricultural and pastoral requirements, includinga fair and equitable proportion of springs or permanent water".⁴⁷ Further, a native had the right to acquire, hold, encumber and dispose of land on the same conditions as a person who was not a native; but in order to guard natives against others who might have capitalized on their ignorance of the commercial nature of land transactions, the Order in Council provided that whenever there was a contract to be executed for encumbering

or alienating land by a native no such control was to be valid unless it was made in the presence of a magistrate who was to attest it, and who was then required to issue a certificate signed by him stating that the consideration for the contract was fair and reasonable and further, that the native understood the transaction.⁴⁸ Yet though the Order in Council entrenched land rights in favour of natives, and prohibited the arbitrary acquisition of natives' land by "any person", the enjoyment of this right was, however, curtailed in one significant way, namely by the Order in Council providing that "the Company shall retain the mineral rights in all land assigned to natives". In effect, this meant that if the Company required any such land "for the purpose of mineral development", or even for sites for townships, railways or other public works associated with the mining of any mineral discovered, natives could be ordered to leave such lands. The only condition contingent upon such a forced removal of natives was that such natives were to be assigned "just and liberal compensation in kind" elsewhere sufficient and suitable to sustain their agricultural and pastoral requirements.⁴⁹ Otherwise, the Order in Council explicitly prohibited the removal of natives from any land assigned to them, and also from their kraal⁵⁰ and made it an offence, punishable with imprisonment for any period not exceeding two years upon conviction by the High Court.⁵¹

The machinery created under the North Eastern Rhodesia Order in Council for the effective protection of native interests whenever their infringement was threatened, was not spelled out in any definite and specific manner. Under the Order in Council any allegation as to the infraction of any of the protective provisions under it was not to be the subject of judicial enquiry, but was rather left to be decided upon by the appointed Company administrators. Thus all questions, for example, relating to the land rights of natives, were to be dealt with and decided upon by the administrator, whose decisions on all such matters were to be reported to, and subject to review by, the High Commissioner.⁵² The Commissioner's reviewal powers were further subjected to imperial scrutiny, as he was required to transmit a report upon every case relating to natives dealt with by him to the Secretary of State. The Secretary of State was vested with power to reverse or modify any decision given by the High Commissioner, and would give his directions in the matter as he thought fit; such direction was to be obeyed by all persons,⁵³

But at the stage when the matter relative to a native's rights was before the High Commissioner, judicial opinion could be sought if the Commissioner wished the case to be referred to a judge of the High Court. The relevant provision was as follows:

"The Commissioner may, if he thinks fit, refer any question relating to natives for report to any judge of the High Court, and the judge shall thereupon make such inquiry as he thinks fit, and shall report to the Commissioner the result of such inquiry. The Commissioner may act with reference to any such report as he thinks fit".⁵⁴

Quite evidently, therefore, the High Commissioner had a wide discretion to deal with any conflict arising between a native or natives and any Company officer, and the role of a judge of the High Court, if asked at all to render his opinion, was merely advisory and, therefore, not binding on the Commissioner. This is quite understandable from the constitutional position of the High Commissioner, since he was the one who was responsible and accountable to the Imperial Government. But there was also the practical aspect of administering justice by bureaucrats at this early stage, since "the British Courts, composed of BSA Company officers, were undermanned and ill-equipped from the outset".⁵⁵ In any case, the Courts at this stage could hardly be suitable instruments for the civilizing of natives or for harmonizing some of the contradictory traditional norms of natives with those of the Western social, political, and legal concepts.

It is clear also that from the outset the administrative policy of both the Company and the Imperial Government was to leave natives free to pursue their own style of life according to their customs. This was given effect by the Order in Council when it enacted that all marriages

contracted by natives according to their native law or custom were to be recognized as valid by any Court. This also meant that polygamous marriages were accepted by the colonial regime. But the application of customary law as a whole was also limited to instances where it was not "repugnant to natural justice or morality". The Order in Council provided that:

"In civil cases between natives the High Court and the Magistrates' Courts shall be guided by native law so far as that law is not repugnant to natural justice or morality, or to any Order made by Her Majesty in Council, or to any Regulation made under this Order. In any such case the Court may obtain the assistance of one or two native assessors, to advise the Court upon native law and customs, but the decision of the Court shall be given by the judge or magistrate alone. In all other respects the Court shall follow, as far as possible, the procedure observed in similar cases in England".⁵⁶

From this time and throughout the history of Northern Rhodesia the clause, otherwise known as the "repugnancy clause", remained on the statute book, and has been retained even after independence. The Local Courts Act passed in 1966, that is, two years after Zambia's independence, provided that a Local Court shall administer African customary law applicable to any matter before it "in so far as any such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law...."⁵⁷

The obvious import of the "repugnancy provision" is to limit the scope for the application of native law and customs by implying that such laws and customs can only

operate if they pass the criterion supplied by English law,⁵⁸ because as Lord Sumner said, the effect of the movement of white settlement in the Company territories supported by the Crown was that the aboriginal system gave place to another prescribed by the Order in Council.⁵⁹ There have also been a few cases recorded in Northern Rhodesia or Zambia invoking the repugnancy clause. In R. v. Mubanga and Sakani,⁶⁰ a direct clash between a Bemba tribal law and the dictates of Christian religion came out into the open. The appellants were charged with contempt of Bemba traditional law under the Native Authority Ordinance because they had refused to abide by the Chief's orders that, in accordance to the Bemba customary law they, together with other tribesmen, were required to contribute millet for the purpose of worshipping the tribal spirits. The appellants' refusal to follow this customary practice was based on the fact that they, being Christians, would be doing something which their Christian teaching did not approve of it, and was indeed against it. In the High Court of Northern Rhodesia it was found that, in fact, the so-called custom of offering millet was never established among the Bemba tribe; but the Court went on to make the important point that even if it was established, it would still have been inconsistent with other laws in force in the territory and "repugnant to justice", and that "native customary law cannot be sustained where it is in conflict with the Common Law".

A Tanganyikan case⁶¹ presented to the High Court of Tanganyika the interesting question as to whose conception of "natural justice and morality" should be applied in terms of the Tanganyika Order in Council (1920) which also contained the repugnancy clause in exactly the same wording. The Court supplied a clear answer in the following words:

"To what standard, then, does the Order in Council refer - the African standard of justice and morality or the British standard? I have no doubt whatever that the only standard of justice and morality which a British court in Africa can apply is its own British standard".

There is also no doubt that the expression "morality" in the repugnancy clause represents morality as interwoven in the Christian religion so that if any mode of tribal worship was found to exist inconsistently with Christianity it would, for that reason, be declared unlawful.⁶² This is, in fact, what was implied in the Zambian case of Mubanga and Sakeni referred to thereabove.

In another Northern Rhodesian case,⁶³ the High Court reversed an order of the highest Native Court in Barotseland purporting to expel the appellant from his home village and requiring him to be removed to another district he had never lived in. The only reason why he was to be expelled was that his conduct was becoming offensive to the local induna (a kind of councillor to the chief responsible for the area). Reversing the order the High Court ruled that the action of expelling a native from his home was repugnant to natural justice and morality. Patterson, C.J., then gave a noteworthy

observation about the repugnancy clause in the following terms:

"Nevertheless, in deciding whether an order is repugnant to natural justice or morality, I must apply the somewhat stricter standards that a judge of the High Court should observe. I consider that it is the duty of the High Court in deciding cases relating to the liberty of the subject to set as high a standard of human conduct as is consistent with the due maintenance of law and order and the rights of other individual persons".⁶⁴

Further, Patterson considered that before a native court could make an order expelling a man from his home, the court would have to be satisfied that there was no lesser remedy which would be sufficiently effective for the purpose of maintaining security, peace, and good order in village. Meanwhile, earlier on he had observed:

"I consider that it is the duty of the High Court in deciding cases relating to the liberty of the subject to set a high standard of human conduct and is consistent with the due maintenance of law and order and the rights of other individual persons".

The importance of this decision to the instant investigation is that it immediately shows that there was a mutual relationship between the "repugnancy clause" and the ends of human rights. No doubt the repugnancy clause was, at least not in a small measure, intended to discourage certain tribal practices and customs which were inherently incompatible with certain principles of humanity as expressed through the concept of human rights. It might therefore have helped to bring down servitude and inhuman treatment practised in some tribal societies, and

at the same time harmonizing the less offensive ones to the introduced scheme of law. This view seems to be fortified by the case of In re Southern Rhodesia,⁶⁵ where the Privy Council said:

"Some tribes are so low in the scale of social organization that their usages and conception of rights and duties are not to be reconciled with the institutions or legal ideas of civilized society. Such a gulf cannot be bridged... On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law".

In the midst of such tribal practices as slavery, the slaughtering of certain commoners to accompany the burial of a chief, amputation of hands of those found guilty of theft, and certain aspects of witchcraft, the operation and annulling effect of the repugnancy clause was naturally called for.⁶⁶

C. Unification of North Western and North Eastern Rhodesia under the first Constitution, 1911

Hitherto we have been discussing the government of Northern Rhodesia under the Company and the protective provisions therein before 1911. On May 4, 1911, the Northern Rhodesia Order in Council of 1911, revoking the North Eastern and Barotseland-North Western Orders in Council and merging the two territories into one jurisdiction, was promulgated; its provisions were brought into operation by the Northern Rhodesia Proclamation, Number 1, of August 17, 1911. This, in effect, meant that the two former territories of North Western and North Eastern Rhodesias merged into a single territory to be known as Northern Rhodesia under the government of the BSA Company.

The Northern Rhodesia Order in Council, 1911, followed closely the pattern of the North Eastern Order in Council, and was in all essentials a replica of the latter Order. Naturally, there were certain changes in the administrative structure necessitated by a change in the constitutional status of the territory. But with respect to the provisions incorporating safeguards for natives, the 1911 Order in Council reproduced, verbatim, all such provisions as they existed in the North Eastern Rhodesia Order in Council.⁶⁷ Also incorporated in the new scheme was the concept of imperial control over the company's legislative and administrative activities through the power of disallowance conferred on the Secretary of State;⁶⁸ and through the requirement that the appointments of principal officers by the Company be approved by the Secretary of State. By virtue of this power, Proclamation No. 9 of 1912, which provided for collective punishment in the territory, was disallowed.⁶⁹ There was also one vital area in which the legislative exercise of power in the territory was limited under this Order. The High Commissioner for South Africa was the constituted authority vested with the power to make legislation by proclamations in the territory. Proclamations issued were, however, subordinate legislation, as the High Commissioner's powers depended upon the Order in Council or Letters Patent appointing him to the office. Moreover, all such legislation was subject to the overriding authority of the Colonial Laws Validity Act, 1965, which reads that:

"Any colonial law which is or should be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such laws may relate, or repugnant to any Order or Regulation made under the authority of such Act of Parliament,.....shall be read subject to such Act, Order, or Regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative".⁷⁰

Apart from these few remarks, the position of the Company's authority over Northern Rhodesia remained essentially the same until 1924 when the British Government assumed direct responsibility for the administration of the territory.

D. Crown Administration and Constitutional Safeguards 1924-1962

By the early 1920's, the Company was experiencing grave administrative and financial problems in running the territory, and its officials were satisfied that the problems could no longer be contained. The Crown was also satisfied that the BSA Company administration could be improved upon. Thus, by the Devonshire Agreement of September 1923, Company rule was ended. On February 20th, 1924, the Crown assumed responsibility for the administration of the territory. The 1911 Order in Council was revoked and replaced by the Northern Rhodesia Order in Council, 1924. Henceforth Northern Rhodesia became a Protectorate with a constitution of the usual "Crown Colony" type.

i) The meaning and legal nature of a "protectorate"

Wight says that ".....legally, a protectorate is a dependency that has not been annexed: it is not part of the dominions of the Crown, and its inhabitants are not British subjects".⁷¹ Because a protectorate is not part of the Crown's dominions it is, therefore, technically a foreign country. In the Northern Rhodesian case of Ex Parte Mwenya,⁷² which involved impugment of the Governor's detention order in an English court, the Secretary of State in his affidavit swore that Northern Rhodesia is "a foreign country within which Her Majesty has power and jurisdiction by treaty, grant, usage,

sufferance and other lawful means within the meaning of the Foreign Jurisdiction Act, 1890, but not recognized by Her Majesty as.....part of the Dominions".⁷³ Herein lies the distinguishing mark between a protectorate and a colony.

A colony is part of the Crown dominions, and its inhabitants are British subjects for "the settlers who established settled colonies took with them all the rights of the British subjects....." But in actual fact, the institutions of government established in protectorates and colonies, and the modes of administration in both sets of territories were the same. As Kennedy, L.J., in Sekgome's case,⁷⁴ commented, the powers exercisable in a protectorate are "usually so complete that they are indistinguishable from those enjoyed in a territory which is part of the Her Majesty's dominion," hence the designation "colonial protectorates".⁷⁵ Another element of a protectorate is brought out by Sir Henry Jenkyns.

A protectorate is a territory:

".....which is not within the British Dominions, but as regards its foreign relations it is under the exclusive control of the King so that its government cannot hold direct communication with any foreign power, nor a foreign power with that government".⁷⁶

The relevance of unfolding the legal nature of a protectorate in this inquiry will be appreciated when we discuss the extent to which an English court could intervene in the legal controversies of a protectorate in defence of personal liberties.

ii) The constitutional arrangements in the Northern Rhodesia Protectorate 1924-1963

There were really three basic instruments which provided the constitution of the Northern Rhodesia Protectorate from 1924 to 1963 - the Northern Rhodesia Order in Council, 1924, the

Northern Rhodesia (Legislative Council) Order in Council, 1924, and the Instructions passed under the Royal Sign Manual and Signet to the Governor and Commander-in-Chief.

a) Institutions of Government created by the Northern Rhodesia Order in Council, 1924

The most important institutions constituted by the 1924 Order in Council were the Office of the Governor, the Legislative Council, the Executive Council; and the High Court, Magistrates' Courts, and Native Commissioners' Courts were retained as they existed under the 1911 Order in Council - but with slight changes in their organizations.

In place of the Administrator under the 1911 Order in Council, the 1924 Order made provision for the appointment of a Governor and Commander-in-Chief of the territory.⁷⁷ The Governor was designated as the principal imperial officer and was therefore vested with extraordinarily wide powers, the exercise of which was made subject

".....to the tenor of any Orders in Council relating to the territory and.....according to such instructions as may from time to time be given to him....."

by Her Majesty's Secretary of State.⁷⁸ The entire executive authority in the territory was vested in the Governor and, although provision was made for the creation of an Executive Council for the purpose of advising the Governor,⁷⁹ the latter could in fact act contrary to the advice so rendered. In this event he was required to report to the Secretary of State for the Colonies his

reasons for disagreeing with the Executive Council, and the members of the Council (formerly composed entirely of officials)⁸⁰ were entitled to have their views placed on record. This was presumably intended to be a deterrent to arbitrary action by the Governor, since the requirement of reporting to the Secretary of State the circumstances in which he failed to act in concurrence with the Council, and the requirement that the views of the Council be placed on record, had a restraining effect on the Governor's decision and of its rational content.

Also established by the 1924 Order in Council was the Legislative Council. The establishment of the Legislative Council in Northern Rhodesia was a direct response to pressure from the white settlers who, between the period 1911 to 1923, were agitating for an effective share in the government of the territory.

The Buxton Committee, which was appointed on 7th March 1921, by the Secretary of State to advise on a number of matters raised in the white settlers' petition about the constitutional future of the territory, came out (in its five-page report of 25th April 1921), with the view that the settlers' claims to an effective participation in the governmental affairs of the territory "were reasonable".⁸¹ It therefore recommended that the BSA Company should consider the establishment of a

Legislative Council. But since the question of the termination of Company government was also under active consideration, the issue of establishing a Legislative Council during the Company's rule was postponed until this issue was resolved.

Thus, when the issue referred to above was resolved and the territory placed under direct imperial rule, the Legislative Council was one of the most significant institutions which emerged from the first constitution of the Northern Rhodesia Protectorate.⁸² The Council was effectively constituted by the Northern Rhodesia (Legislative Council) 1924, which was proclaimed on the 8th May 1924.⁸³ The first Governor of Northern Rhodesia, Sir Henry Stanley, clarified the nature of the Legislative Council when it first met. He said:

"It is hardly necessary for me to emphasize that a council such as ours is not a parliament in the generally accepted sense of that term. It is constituted on a different basis, which obviously places the government in a position to exercise effective control".⁸⁴

The Legislative Council was to consist of the Governor as President, ex-officio members, officials nominated by the Governor, and elected unofficial members.⁸⁵ A Nova Scotian (Canada) case decided that the tenure of office of the members of the Legislative Council was during the pleasure of the Crown, or for life as they were appointed during pleasure.⁸⁶

The Legislative Council had "full power and authority" to make ordinances "as may be necessary for the

administration of justice, the raising of revenue and generally for the peace and good government of Northern Rhodesia". But the Governor was elevated above it since he could veto the making and passage of all such laws.⁸⁷ This provision was significant considering that the Governor was very much a component of the Council and, indeed, its president. In the end, all ordinances which were made for the territories were "enacted by the Governor.....with the advice and consent of the Legislative Council..."⁸⁸ In effect, the Governor was indeed the legislature by himself.⁸⁸ It is clear from what we have said respecting the Governor's role in the colonial administration, that his office combined the two main state powers of ^{executive} and legislative all effectively under his authority. The concentration of such power in the Governor meant that the legislature was subordinated to the executive, which was responsible only to Secretary of State. This form of ^{gubernatorial} regime has therefore been called "autocratic".⁸⁹ But perhaps, before describing the system of government as autocratic, it is necessary to look at the kind of protective provisions or control mechanisms which were erected by the constitution to guard against the abuse of power by the Governor.

E. Protective Provisions and Control Mechanisms under the First Constitution of the Protectorate, 1924

There were a number of weaknesses in the constitutional arrangements of Northern Rhodesia (1924), and the Northern Rhodesia Order in Council 1924 was designed to control the actions of the colonial officers, especially the Governor and his principal officers. It would appear that the Imperial Government was far more strict in the control of the Company's administration than it was in the colonial regime after 1924. This is clear from the range of almost uncontrolled powers given to the colonial regime under the territory's constitution of 1924, as compared with the same powers meted out to the Company's government in the preceding period.

However, the same principles which underlined the mechanics of control during the Company's administration were retained under the new colonial administration: these were, the express incorporation of protective provisions in the basic documents of government, and the subordination of the colonial government to the Imperial Government.

The Northern Rhodesia Order in Council (1924) followed closely the pattern of the 1911 Order in Council, which in turn was, as already indicated, erected upon the North Eastern Rhodesia Order in Council, 1900. But there were vast changes as regards the type of government institutions established, their relationships inter se, and their relationship with the Imperial Government - which were necessitated by the territory's assumption of a different character of constitutional status. The point, however, is that the connection of the Protectorate's new constitution with its predecessors turned out to be that those safeguards which were designed to preserve the

interests of natives in the previous constitutions⁹⁰ were retained under the new constitutional order. Thus such safeguards as restrictive regulations against discrimination as regards natives,⁹¹ protection of rights of land by natives,⁹² prohibition of removal of natives from kraal or land,⁹³ authorization of native law and custom to be applied in civil cases between natives,⁹⁴ freedom of natives to marry under native law and custom⁹⁵ - were all given effect and continued by the Order in Council. In addition, the native rights reserved under the Lewanika concessions were now given express effect by the Order in Council in the following terms:

"It shall not be lawful for any purpose whatever to alienate from the Chief and people of Barotse, the territory reserved from prospecting by virtue of the concessions from Lewanika to the BSA Company, dated 7th day of October, 1900, and the 11th day of August, 1909".⁹⁶

But it was in the area of the control of the Governor and the Legislative Council by Whitehall that the Order in Council introduced novel ideas. The imperial government on its part was aware that in a colonial situation where the legislature was powerless to control the actions of the executive, or where no reliability could be placed on the control by the electorate, or by any effective judicial control, an ideal situation for despotic behaviour was potentially facilitated. It therefore armed itself with power to check against arbitrary tendencies by the colonial regime. The imperial government's approach to this problem assumed the "positive" and "negative" dimensions. The positive aspect was manifested in its desire to charge the Governor, as an instrument

of implementing imperial policy in the territory, with the responsibility of seeing to it that the general welfare of natives was given prominence. The imperial government regarded itself as the trustee to the natives until such a time that they were able to take over the reins of power in the territory - and this attitude of the imperial government was given reality with the publication of the Secretary of State's Memorandum on Native Policy in East Africa in 1930. In this paper Lord Passfield, then Secretary of the State for the Colonies, affirmed that "the main responsibility of Great Britain in East Africa was a trustee for the native peoples not yet able to stand on their own feet", and that "this would necessitate the retention of final control by His Majesty's Government....." of the colonial administration in Kenya. Most significantly, the paper emphasized that:

"the interests of African natives must be paramount, and that if, and when, those interests and the interests of the immigrant races should conflict, the former should prevail".⁹⁷

The publication of this memorandum provoked a storm of intense protests by the white settlers of Northern Rhodesia, and made the Governor of Northern Rhodesia, Sir James Maxwell, act by summoning and meeting the unofficial members of the Legislative Council to elucidate upon the meaning and implications of the paper. In this connection he said:

"There is nothing whatsoever.....in [the] White Paper which means any change of policy on the part of the Government, and.....there is nothing in it which in my opinion is detrimental to the interests of white settlers or to other people of European origin who have come to, and are working in this country. Paramountcy of native interests did not

"mean racial discrimination. Where you have a group of Europeans conflicting with the interests of a group of natives it does not mean that the interest of that group of natives is to prevail simply because they are natives, but in my opinion it does mean that if you have some question arising in which the interests of the natives as a whole are at variance with the interests either of the Europeans as a whole or of a group of Europeans, that the interests of the majority⁹⁸ of the population, that is the natives, must prevail".

The imperial government's conception of their relationship to the natives as trustee for their "material, physical and moral advancement" was reflected in the provisions of the protectorate's principal instruments of government. By Section 22 of the Northern Rhodesia Order in Council, 1924, all ordinances to be passed by the Legislative Council were to respect:

"Any native laws or customs by which the civil relations of any native chiefs, tribes or populations under His Majesty's protection are.....regulated....."

And Section 23 reserves to the Crown government, through the Secretary of State for the Colonies, the right to disallow any ordinance passed by the Governor in Council. Also reserves to itself was the power of the Crown government to make such laws or ordinances as may appear to be necessary for the peace, order and good government of the territory.⁹⁹ Moreover, certain categories of bills were removed from the power of the Governor for assent; there were four types of such bills, but only one type seems relevant to be mentioned in connection with the present discussion. The Governor was not to give assent to:

"Any bill.....whereby natives may be subjected or made liable to any conditions, disabilities or restrictions to which persons of European descent are not also subjected or made liable".¹⁰⁰

Further, in making and establishing bills and ordinances, the Governor and the Legislative Council were obligated to conform to and to observe not only the directions contained in the Order in Council, but also "any instructions under His Majesty's Sign Manual and ^{Signet}". Simultaneously with the promulgation of the 1924 Order in Council, the Royal Instructions of 26th February 1924, were also passed defining, among other things, the duties of the Governor. One of the principal duties directed at the Governor in relation to native inhabitants was that:

"The Governor is, to the utmost of his power, to promote religion and education among the native inhabitants of the Territory, and he is especially to take care to protect them in their persons and in the free enjoyment of their possessions, and by all lawful means to prevent and restrain all violence and injustice which may in any manner be practised or attempted against them".¹⁰¹

i) The decision in R. v. De Jager¹⁰²

The provisions requiring the Governor in Council to conform with Royal Instructions and the imposition by the latter of a duty on the Governor (inter alia) to promote religion among the native inhabitants, and safeguard them in the free enjoyment of their possessions, was relied upon in the De Jager's case to impugn the validity of a proclamation passed by the Governor in Council as restricting the freedom of conscience and as an infringement of, or a non-compliance with, the terms of the Royal Instructions. The case was decided by the High Court of Northern Rhodesia in 1935.

The applicant was a representative of the "Watchtower Bible and Tract Society" and was convicted by the Acting Resident Magistrate of Ndola District of two offences under

the Penal Code of the territory. The evidence was that he was found in possession of certain books, to wit 4 books named "Deliverance" and one book named "Jehovah". The importation into the territory of these categories of literature was prohibited by Proclamation No.9 of 1935, passed by the Governor in Council pursuant to the power conferred by the Penal Code. In the High Court the appellant set himself to test the validity of the action of the Governor in Council in issuing the proclamation, inter alia, on two ground. First, the appellant argued that "The Proclamation is repugnant to a basic principle embodied in the Law of England which in its recognition of freedom of conscience applies in Northern Rhodesia". Secondly, he argued that the proclamation was invalid because "any act in deprivation of the use of these books by the Natives of this Territory is an infringement of, or at least a non-compliance with, the terms of the Royal Instructions, which impose on the Governor a duty to promote religion among the Native inhabitants". We shall respectively denote the two grounds of appeal as the issue of validity of the proclamation because of its inconsistency with some principles of English law, and secondly, the issue of the invalidity of the proclamation because of its inconsistency with the Royal Instructions:

a) Proclamation versus some principles of English law

On the first issue of the claim of invalidity of the proclamation because it was inconsistent with the principles of English law recognizing the freedom of conscience and

religion which applied to Northern Rhodesia, Francis, J., first admitted that English law was made applicable to the territory by virtue of the provisions in the Northern Rhodesia Order in Council, 1924,¹⁰³ and also by the operation of Section 11 of the High Court ordinance, 1933, where the application of English law was more specifically dealt with. But, he argued, the application of English law to a colonial territory does not render the power invested in the local legislature to legislate for the peace, order and good government of the territory restrictive in any way; and since what may be suitable in the law of England may not always be expedient in an African colonial dependency, it was perfectly permissible for the local legislature to pass certain laws which may not always be in harmony with some principles of English law. In support of this proposition the Court cited the case of Rex v. Crewe ex parte Sekgome¹⁰⁴ where Farwell, L.J., propounded the principle that in a local enactment there may be repugnancy to the law of England, and that that enactment would not be treated as invalid except in so far as such repugnancy is not to some principle of natural justice, the violation of which would induce a Court not to give effect to it, or is not to some imperial statute. This then was the limitation which was placed on the applications of English law to a colonial situation.

After exposing the above stated principles, the Court then came directly to resolve the issue by making the point

that religious matters were subject to the control of the legislature if in its view such matters needed some control. But, while conceding the fact that certain matters were so fundamental to freedom of worship, like the Holy Scriptures, etc., the judge held that there were certain matters which did not go to the roots of the act of worship, and their curtailment would not diminish the enjoyment of the freedom of worship. The Court concluded:

"When, however, the case involves books containing politico-religious teachings of a kind noticeable in those under review, the matter assumes a different complexion. Politico-religious discussion among the educated invariably excites controversy, and its propaganda among primitive people may lead quite feasibly to misconception. Consequently, I am not prepared to say that the deprivation of literature of this order is an interference with any principle of natural justice".

Further, the Court drew attention to the question raised by the applicant regarding the alleged repugnancy of the proclamation to an English law establishing freedom of conscience in religious matters, and commented that the argument failed because the applicant did not identify or particularize which English statute law, or which common law principle he was referring to as having been infringed.

b) Issue of alleged invalidity of proclamation because of its inconsistency with the Royal Instructions

It will be recalled that the proclamation was alleged to offend against Royal Instructions given to the Governor requiring him to promote religion among the natives. The

applicant argued that prohibiting the importation of religious literature into the territory, which is an essential component of religious activity, constituted an act against law which the Royal Instructions expected the government to strive for, namely, the promotion of religion among the natives. Worshipping or any form of religious activity is also fulfilled through the use of books and literature, wherein are contained religious doctrines. But here the Court made a distinction between two categories of religious literature, viz., ".....Holy Scriptures, the Koran, or books of a liturgical or devotional nature....." of any creed and said that prohibition of such literature would certainly amount to a contravention of the freedom of conscience in religious worship; but this was not true of the prohibition of a second category of books, containing "politico-religious teaching" which may not be in line with the needs of peace, order and security of the territory. Thus the Court said, "it would seem that the Government considered certain of the Society's publications appearing in this Territory, to have a subversive influence on the Natives..."

The Court then concluded:

"Now directly if such a contingency arose, it would appear to me that there is a duty imposed upon the Governor to act, as and when he thought fit..... if his view of the facts was a reasonable view for him to take - it appears to me to be impossible to deny that, so far as it relates to the two books in question, this proclamation was a valid proclamation, not ultra vires, but within the scope of the power and duties entrusted to the Governor".

On the whole the effect and tenor of the decision in De Jager's case was that there could be a substantial area of English law which, though it incorporated important principles of personal liberties, could not apply in a dependent territory. The Court asserted this fact when it observed that "It is not uncommon.....to find among the laws of the British Dominions and possessions generally, instances where principles of English law, important or otherwise, have been abrogated or modified to meet local conditions". The claim that personal rights and freedoms were better protected in England than in the colonial territories may have been justifiable proposition in respect of those areas of freedoms with close affinity to political matters, that is political and civic rights like freedom of association and assembly, freedom of expression, freedom of the press and publication, etc. We shall notice this aspect of colonial constitutional practice at a later stage. For the moment it is intended to take up the subject of the protection of the right to personal liberty during the colonial period, and to discuss this subject against the background of one of the most celebrated personal liberty decisions by an English court in the Northern Rhodesian case of Ex parte Mwenya.¹⁰⁵

ii) Ex parte Mwenya: Protection of personal liberties during the colonial period

The case of Ex parte Mwenya decided by the English Court of Appeal on behalf of a native of Northern Rhodesia, is important not only because it overruled previously obtaining authorities

that English courts cannot issue the writ of habeas corpus in respect of a person detained or restricted in a protectorate, but also because it decided that that most important instrument for the protection of personal liberty in England, the writ of habeas corpus, could be used by "British protected persons" to challenge the abuse of power by the colonial regime in the area of individual liberties. The case is also important to this present investigation, because it shows exactly the extent to which the Secretary of State could control the actions of the Governor as prescribed by the constitution of the Protectorate which we have discussed.

The facts of the case were straightforward and can be recounted briefly here. The applicant was a native of the Protectorate of Northern Rhodesia, and was the subject of two restriction orders made by the Governor of Northern Rhodesia pursuant to powers conferred on him by the Emergency Regulations, 1956, of Northern Rhodesia requiring the applicant to remain in the district of Mporakoso. The applicant applied for a writ of habeas corpus to the English Divisional Court directed to the Secretary of State for the Colonies, the Governor of Northern Rhodesia, and the District Commissioner of Mporakoso District on the ground that he was unlawfully detained and asking to be set free. Under the Constitution of the Protectorate of Northern Rhodesia, the Secretary of State, as we have seen, had extensive powers to control the legislative and executive powers of the Governor, or the Governor in Council, but under the specific emergency legislation under which this restriction

order was effected, his approval or consent to the restriction orders was not required, and he took no part in the detention.

The Court was asked to resolve two issues, namely:

(i) whether an English court had jurisdiction to issue the writ of habeas corpus to persons, like the Governor and District Commissioners, in a protectorate; and (ii) whether the Secretary of State, by reason of his constitutional position, possessed sufficient custody of the applicant to be amenable to the writ.

a) Whether English courts were competent to issue the writ of habeas corpus to a protectorate

On this issue the applicant submitted that there was a duty on the part of the Crown to safeguard the liberty of all subjects within the realm, and that in principle the writ should go wherever there has been an unlawful act by a servant of the Crown, "for if Her Majesty may not enquire why someone entitled to her protection is unlawfully detained, then that protection is endangered".

In reply the Attorney-General, who had all the previous authorities in his favour establishing that the writ cannot issue to a protectorate, argued that Northern Rhodesia, being a protectorate, and not a colony, was no part of Her Majesty's dominions in the territorial sense and, according to the Foreign Jurisdiction Act, 1890, it was a foreign territory in which Her Majesty exercised power and jurisdiction by treaty, grant, usage, etc. In fact, the writ of habeas corpus had never before issued to a

territory not forming part of Her Majesty's dominions. In Ex Parte Anderson,¹⁰⁶ decided in 1861, an English court issued the writ to the County of York in Canada which was part of the Queen's dominions. In a more or less similar case which arose from Bechnuanaland, Ex Parte Sekgome,¹⁰⁷ an English court considered the issue whether writ could issue to a protectorate (Bechuanaland), but the majority of the judges there thought that the writ applied "only to the territorial dominions of the Crown", and "that the protectorate formed no part of His Majesty's dominions of the Crown",¹⁰⁸ and therefore the application was turned down. In the case of Ex Parte Mwenya (as in Ex Parte Sekgome) it was further argued that there were courts of law established by the protectorate's constitution which had jurisdiction to deal with the question of the legality of the detention, and that by Section 1 of the Habeas Corpus Act, 1862, the writ ought therefore not to issue.

On this first issue the decision of the Divisional Court, delivered by Lord Parker, C.J., in effect acknowledged previous authorities, but was based on the concept of sovereignty and its implications. The Court observed that the writ of habeas corpus was a prerogative writ, and therefore a manifestation of the sovereignty of the Crown as an instrument by which that sovereignty is exercised. Therefore, the power to issue this writ was co-extensive with such sovereignty. Since the Crown possesses complete

sovereignty only in respect of its dominions, and not in protectorates where there is present some other "competing sovereignty", the writ cannot issue. But surely there was no competing power in a protectorate like Northern Rhodesia, and the control of the imperial government through the colonial regime was, in fact, complete.

- b) Whether the Secretary of State by virtue of his constitutional position had sufficient custody so as to be amenable to the writ

The submission of the applicant on this issue was that the Secretary of State, by virtue of his constitutional position in the protectorate, could control the exercise of power of the Governor vis-a-vis the colonial inhabitants. It will be recalled that when we were discussing the Orders in Council and the Royal Instructions, or the constitution of the protectorate, the Secretary of State quite clearly had some power, and de facto control, over many activities of the Governor. According to his affidavit in this case, the Secretary of State swore that his constitutional position in the protectorate was only to advise Her Majesty with regard to the exercise of her power and jurisdiction in the territory. He then denied that he possessed any power to order the Governor to revoke the restriction order. In reply Parker, C.J., ruled that the constitutional powers vested in the Secretary of State by the protectorate's constitution does not give the Secretary custody of the body of the applicant.

The applicant appealed before the Court of Appeal, and Lord Evershed, M.R., reversing the decision of the Divisional Court, ruled as follows:

"But, as it seems to me, if upon a proper investigation of the facts, it appears that the internal governance of Northern Rhodesia is in legal effect indistinguishable from that of a British colony or a country acquired by conquest, then in conformity with the nature of the writ.....I see for my part no reason for denying jurisdiction to the Court..... If the fact is that the power and jurisdiction of the Crown vis-a-vis Northern Rhodesia is no whit different from that exercised in a "colony" or "dominion" then in my view, there is nothing, historically or logically, which bars the making of an order of habeas corpus."109

The decision in this case confirms the view that in the area of the protection of personal liberties, citizens of colonial territories (including those of protectorates) were secured roughly to the same degree as those in England - since the former had also the benefit of entitlement to the issuance of a writ of habeas corpus from English courts. It is unfortunate that this case came up for decision rather late (i.e., in 1959) when the British colonial era in Africa was coming to an end (five years before Zambia attained independence). But can it be said of the same in respect of other types of fundamental rights and freedoms that the citizens of colonial territories were secured in the enjoyment of, say, the freedom of assembly and association, of expression, of movement, etc., as those in Britain?

F. Protection of Civil and Political Freedoms and the Colonial Rule

When discussing a topic of this nature and for the purposes of understanding the underlying factors behind the colonial regime's reaction to certain activities of the colonial peoples, it is important to appreciate the initial point that the principal preoccupation of the colonial government was with the preservation of public order and security, and that it was always apprehensive of any kind of challenge to its authority. It was therefore readily disposed to subordinate the rights of an individual to public security whenever both should happen to be in conflict.

This is exactly what happened in the events after March 11, 1959, in Northern Rhodesia when the Governor of the territory invoked his powers under the Emergency Powers Ordinance.¹¹⁰ This declaration of emergency (actually a "semi-emergency")¹¹¹ followed the announcement by the Government that a general election for the territory's Legislative Council would be taking place at some future date. To this the African nationalist movement was divided in that the newly-formed party - the Zambia African National Congress (ZANC) under the leadership of Kenneth Kaunda - indicated that it was going to boycott the election and that it would use any means in order to induce or compel Africans to refrain from voting or from standing as candidates for the election. This arose out of the dissatisfaction with certain aspects of the country's new constitution of 1958, which did not meet the Africans' expectations for internal self-government. On the other hand, the Northern Rhodesia African National Congress, under Harry Nkumbula, though not accepting all the features of the new constitution, decided not to support a boycott of the election, but to encourage members to vote. In the event, ZANC embarked on a

regime of intimidation, force, violence and restraint against Africans in order to induce them, or compel them to refrain from voting or standing as candidates in the election.¹¹² ZANC also systematically planned to obstruct voters at the polling stations or on their way thereto during the election.¹¹³

In these circumstances, and pursuant to the Emergency Powers Ordinances, the Governor made the Safeguard of Elections and Public Safety Regulations, 1959.¹¹⁴ Under these regulations, the Governor or any of his Provincial Commissioners was given powers to restrict anybody upon satisfaction that that person or group of persons were preparing or participating in actions likely to frustrate the conduct of elections or which would lead to a situation endangering the public safety.¹¹⁵ Further, a "competent authority" (that is, the Governor and his Provincial Commissioners), or a District Commissioner or police officer not below the rank of Assistant Superintendent was empowered to prohibit the holding in any area of a public meeting or procession (organized by any association, society or other organization) upon satisfaction that this would lead to a breach of the peace or order, and would also affect the conduct of elections.¹¹⁶ Further, the police officers and other administrative officers were empowered to arrest without warrant any person guilty of or reasonably suspected of being guilty of an offence against the regulations.¹¹⁷ Powers of search were also granted to the police.¹¹⁸

Finally, the Zambia African National Congress was declared an unlawful organization, and ~~some~~ of its top leaders were deported and restricted to various parts of the country. And those leaders of ZANC who had attempted to make statements considered to promote ill-will or hostility among members of the community, or who made

statements against the government, were taken to Courts to answer charges of criminal sedition.

To start with, in spite of the wide powers conceded to the government by the regulations to restrict anybody, power to make restriction orders, to vary or amend them was given exclusively in the hands of the competent authority who the Safeguard of Elections and Public Safety Regulations defined as the Governor or any Provincial Commissioner. This power, unlike the other powers under the regulations which we have discussed above, did not extend to a District Commissioner or police or administrative officers. Thus in Ex Parte Makasa¹¹⁹ the applicant was served with a restriction order made by the Governor of Northern Rhodesia under Regulation 3 of the Safeguard of Elections and Public Security Regulations, 1959, the effect of which was to restrict the applicant to the Solwezi District of Northern Rhodesia. An application was made to the High Court for the issue of a writ of habeas corpus addressed to the District Commissioner of Solwezi District. The applicant argued that the restriction order was invalid because while in Solwezi he was under the custody and control of the District Commissioner who also imposed some restraints on his movement whilst there. In other words, the allegation was that the District Commissioner administered the 'order' in a manner outside its terms, and that this therefore amounted to a variation of the order which it was outside the powers of the District Commissioner to do so in the light of the provisions contained in the Safeguards of Elections and Public Safety Regulations. Patterson, C.J., expressed the view that under the Safeguard of Elections and Public Safety Regulations, "it is apparent that a Restriction Order can only be made by a competent authority who is

defined in Regulation 2 as the Governor or any Provincial Commissioner".¹²⁰ In this particular case there was no evidence that the District Commissioner was acting at any time on behalf of a competent authority in his capacity as such - otherwise the restriction order would have been declared invalid.

However, the declaration of emergency and the making of the regulations under the Emergency Powers Ordinance to deal with the situation, explained thereabove, prompted a wave of protests and resentment by Africans, especially in view of the harsh manner in which the emergency was handled.¹²¹ Africans now became more and more vocal in their expression of hostility to the colonial government. To this the government resorted to invoking the law relating to criminal sedition as an attempt to quieten nationalists, and it should perhaps be stated here that freedom of expression among the colonial peoples was often flouted through the application of the law of sedition. It is also here that one clearly sees that there were limitations on the freedom of speech in the colonies as compared with the United Kingdom.

In R. v. Chona,¹²² for example, the accused was the National Secretary of the United National Independence Party (UNIP), and in that capacity issued a document described as a "press statement". The press statement purported to describe the evils of colonial rule by alleging inter alia, that there was no justice whatever under colonial rule anywhere in the world. The circular went on to state that:

"Those of you who have attended the courts while trying your political colleagues must have got the same impression as myself, i.e., that the courts are here to rubber stamp oppression and to administer mock justice. As for the native courts, all of you must have got the impression that they have been reorganized to jail any African that the Government Administrative Officials want to be jailed, whether he has committed an offence or not. I have witnessed trials myself from the beginning to the end. If I had tears, I would shed them".

The accused was charged with publishing a seditious publication contrary to Section 53¹²³ of the Penal Code. His defence was that the above words were not seditious, and that there was no "seditious intention" as defined in the Penal Code. On the contrary, the accused argued, the words were published to point out errors or defects in the government or constitution of the territory as by law established, or in the administration of justice, and to try and persuade inhabitants of the territory to procure by lawful means the alteration of the matters he complained of. The High Court of Northern Rhodesia started off by saying that it was entitled to take judicial notice of what was taking place in the country, and that it was against this background that the "intention" associated with the publication of the accused's "press statement" would be abstracted from. The Court found as a fact that it was common knowledge that since 1959 to 1961 there was an outbreak of violence in the territory designed to bring pressure to bear on the government in connection with negotiations, then taking place with regard to the constitution of the territory. Many members of UNIP were then convicted by the courts of violence, arson and destruction of public property. Against this background the Court ruled that "when the statement was written it was a seditious publication because it

intended to bring into hatred or contempt, and to excite disaffection against the administration of justice in the Territory, for the purposes of propagating the policy of UNIP". But compare this case with an English case of R. v. Burns and Others.¹²⁵ The accused in this case were members of the Social Democratic Federation and were charged with uttering seditious words by denouncing the House of Commons

"as composed of capitalists who had fattened upon the labour of the working men....to hang these would be to waste good rope, and as no good to the people was to be expected from these representatives there must be revolution to alter the present state of things".

The English law on criminal sedition as found in Stephen's Digest On the Criminal Law,¹²⁶ is much the same as that found in the then Northern Rhodesian Penal Code. But although in R. v. Burns and Others, it was conceded by the jury that the words uttered were "highly inflammatory", the accused were, nevertheless, acquitted of the charge. Yet in this case there seems to be a strong case for arguing that the natural effect of the words uttered by the accused was to excite disaffection or to bring hatred on members of the House of Commons, and certainly not to point out errors or defects in the system of government or in the administrative procedure of a government institution. The accused also advocated "revolution" as a means of altering the then present state of affairs, which in effect meant use of violence. In R. v. Chona, on the other hand, no violence was ever advocated, and the accused was more concerned with the defects in the administration of justice which he condemned as politically oriented. But the same cannot be said of another

Northern Rhodesian case of Chakulya v. R.¹²⁷ In this case, which also arose from within the same political climate as that of R. v. Chona, the appellant was charged with uttering seditious words contrary to the Penal Code. Mr. Chakulya, a UNIP District Chairman, told a public meeting of 200 Africans that:

"(i) 'If you see anything white with 2 legs, 2 eyes and a mouth as I am, hate it. It is your enemy. You should spit on it'"

and

"(ii) 'The European is a robber', 'The European should be hated', 'We must hate the white man', 'The white man is a liar', 'The white man is a thief'".

Quite clearly these words were uttered irresponsibly to promote feelings of ill-will and hostility among different classes of the community - and it could never be doubted, as the Court said, that the intention behind their utterances was to bring hatred and excite disaffection between the Africans and Europeans. Northern Rhodesia, as we shall see in the next chapter, was a home of many races and to that extent was a multi-racial society. Whites had come to Northern Rhodesia in numbers to run the country's copper mines, the railway, schools, hospitals, the civil service, and generally the country's growing economy. In these circumstances, propaganda based on promoting tension and hatred among the racial groups posed a danger to public order and safety. And freedom of speech is abused if the effect of its exercise is to induce consequences prejudicial to the interests of public safety, public order, etc.¹²⁸

The Chakulya v. R. case should be contrasted with yet another Northern Rhodesian case of Buchanan v. R.¹²⁹ Here again, the

appellant was convicted of publishing a seditious publication in contravention of the Penal Code. She had published a sheet called "Gothic Review". The front of the sheet had the phrases "Anti-communist" and "Pro-Christian", and contained an article entitled "Emergency Regulations - For Whom?". The theme of this article was that the Government of Northern Rhodesia was mistaken in using regulations, that these regulations had the effect of silencing criticism of what was wrong in the territory. There were other subjects on which the article touched, but which are not of immediate relevance here. Did that publication amount to a "seditious publication" having a "seditious intention"? It is in this case that the Federal Supreme Court in Salisbury affirmed the rule laid down in Wallace Johnson v. The King,¹³⁰ that although the elements of a "seditious intention" under the Northern Rhodesian penal code corresponded closely to the intention of Common Law,¹³¹ "it is in the Criminal Code [of Northern Rhodesia]and not in English or Scottish cases that the law of sedition for the colony is to be found". Although the appeal was allowed because of the existence of a procedural defect, one would maintain that even on a substantive issue the case could have been decided in favour of the appellant. We have seen that to succeed on a charge of sedition, the prosecution must establish a "seditious intention" as being behind the publication concerned. Now the Penal Code provided that an act, speech or publication is not seditious by reason only that it intends:

- a) to show that Her Majesty has been misled or mistaken in any of her measures; or
- b) to point out errors or defects in the government or constitution of the territory as by law established

or in legislation or in the administration of justice with a view to the remedying of such errors or defects;

- c) to persuade Her Majesty's subjects or inhabitants of the territory to attempt to procure by lawful means the alteration of any matter in the territory as by law established; or
- d) to point out, with a view to their removal, any matters which are producing or have a tendency to produce feelings of ill-will and enmity between "different classes of the population of the territory".

Quite clearly what the appellant in this case tried to do through her publication amounted to no more than indicating the fact that the government erred in promulgating an Emergency, and that the use of the Emergency regulations had the effect of suppressing the freedoms of individuals such as the freedom of free speech, of movement, assembly and association, and also the right to personal liberty. In other words, she was simply showing that Her Majesty had been misled or mistaken in taking the measures she did through her government in Northern Rhodesia, and that it was because of the brutal way in which the Emergency regulations had been implemented which constituted a source of discontent and dissatisfaction among the people, thereby forcing them to look upon the colonial regime as an oppressive government. According to the Penal Code these circumstances do not establish seditious intention, and therefore the crime of sedition could not possibly be established in relation to the accused in this case. This case has some parallels with that of R. v. Chona, which we have discussed thereabove. In

R. v. Chona, too, the accused was merely pointing out defects in the system of the administration of justice, and criticising colonialism as being inherently inconsistent with justice. Surely this is allowed by the Penal Code as stated above in Clause (b).

We must now conclude our chapter on human rights under the colonial rule. The evidence that we have been able to adduce shows that although the colonial administrative officers had wide powers these were, to a substantial degree, controlled through the mechanisms that we have discussed. However, in practice it would appear that the British Government, which was supposed to be the guardian of African interests vis-a-vis the colonial regime, was thousands of miles away and therefore could not possibly detect how, in practice, the colonial administrators operated the government. Secondly, under the colonial constitutional system there was no code of fundamental freedoms but, as in England, these were largely protected by the ordinary law. However, it is true to say that in the area of the protection of political and civil rights in relation to the indigenous peoples there is evidence to suggest that the colonial regime displayed some signs of authoritarianism. In this context there is no doubt that citizens of colonial territories were not more secure in the enjoyment of such freedoms as the freedom of expression, of assembly and association, of movement, protection from discrimination on grounds of race, sex, language or religion than those of England. In fact, the constitutional incorporation of a bill of rights in the Northern Rhodesian Constitution of 1963, originated from the fact that during the Federal rule (i.e., from 1953-63), racial discrimination was practised on a wide scale to the

disadvantage of Africans, and it is this which constituted their basic grievance and hatred towards the Federation.¹³² In order to help "to allay the fears of domination....." which disturbed Africans, and to give them greater confidence in the future, a bill of rights was suggested to be included in the constitution of the Federation, and in the three territorial constitutions of Southern Rhodesia, Northern Rhodesia, and Nyasaland.¹³³ This epoch in the constitutoonal history of Zambia, especially with regard to the evolution of the Zambian Bill of Rights, is of immense importance to this inquiry, and therefore deserves a separate chapter. It is to this that we should now turn.

NOTES

1. See S.4(1) of the Zambia Independence Order, 1964, which provided that: "Subject to the provisions of this Section, the existing laws shall, notwithstanding the revocation of the existing Orders or the establishment of a Republic in Zambia, continue in force after the commencement of this Order as if they had been made in pursuance of this Order".
2. Many books have been written on the history of Northern Rhodesia, but for our purposes reference could be made to the following: R.I. Rosberg, The Rise of Nationalism in Central Africa: The Making of Malawi and Zambia (London and Nairobi, 1966); Richard Hill, Zambia 1890-1964: The Colonial Period (London, 1976); Andrew Roberts, A History of Zambia (London and Lusaka, 1976); J.W. Davidson, The Northern Rhodesia Legislative Council (London, 1948); and L.H. Gann, The Birth of a Plural Society (Manchester University Press, 1968).
3. For an extended account on this see Andrew Roberts, op.cit., Chapter 14.
4. Ibid.
5. Letter of May 16, 1889, written by direction of Lord Knutsford, then Secretary of State for the Colonies, Parliamentary Paper C.5918, No.88: in Malcolm, The BSA Company, pp.22-23.
6. Formal letter of petition for the granting of the Charter, 13th July 1889: in Malcolm, op.cit., p.24.
7. Royal Charter of Incorporation was effected on 29th October 1889. As for the remarks of the Imperial Government on petitioners' intentions, see Preamble to the Royal Charter in Sir Edward Hertslet, Map of Africa by Treaty, Vol.1, No.34, at p.272.
8. Preamble to the Royal Charter.
9. Malcolm, op.cit. pp 22-23
10. Ibid.
11. Article 1 of the Charter, 1889.
12. See Sir Edward Hertslet, op.cit., p.277.
13. See Andrew Roberts, op.cit., p.159.
14. J.W. Davidson, op.cit., p.16.
15. This is so because not only did this constitute the basis of the Company's claim to the mineral wealth of Zambia, but also because the post-independence politics situation in Zambia was one where the validity of the Company's titles to these minerals was very much in issue.

16. See what came to be called the "Land and Mineral Concessions", dated 17th October 1900. This is available as Appendix II in Gann's book, op.cit., pp.213-225.
17. Ibid.
18. Ibid.
19. See Chapter below.
20. Infra.
21. See Supplementary Agreement to the Charter accepted by the Company on 5th March 1891, and sanctioned by the Secretary of State on 2nd April 1891. See also Article 3 of the original Charter of 1889, in Hertslet, op.cit., pp.273 and 277.
22. See, for example, Article 7 of the North Eastern Rhodesia Order in Council, 1900.
23. Article 2.
24. Article 7.
25. Article 8.
26. Article 15.
27. Article 33.
28. Article 35.
29. Article 11.
30. Article 13.
31. Article 14.
32. Op.cit.
33. See the Land and Mine Concessions, op.cit.
34. See Para.1 of the North Eastern Rhodesia Order in Council, 1900.
35. S.2 of the North Western Rhodesia Order in Council, 1899.
36. S.8, ibid.
37. S.9, ibid.
38. S.11, ibid.
39. Article 8 of the North Eastern Rhodesia Order in Council, 1900.

40. Article 20, ibid.
41. Article 21(1), ibid.
42. Article 21(2), ibid.
43. Article 23, ibid.
44. Article 28, ibid.
45. Article 29, ibid.
46. Article 39, ibid.
47. Article 40, ibid.
48. Article 42, ibid.
49. Article 43, ibid.
50. Article 44(1), ibid.
51. Article 44(2), ibid.
52. Article 41, ibid.
53. Article 48, ibid.
54. Article 45, ibid., author's own underlining.
55. L. Hoover, J. Piper and F. Spalding, "The Evolution of Courts System" ZLJ, Vol.2, 1970, at p.5.
56. Article 36 of the Northern Rhodesia Order in Council, 1911 & also 1924.
57. S.12(1)(a) of the Local Courts Act, 1960.
58. See re. Southern Rhodesia (1919) AC.211 at p.234.
59. Per Lord Sumner, ibid., at p.234.
60. (1959) R. & N.L.R. 169.
61. Gwao bin Kilimo v. Kisunda bin Ifuti (1938), I.T.L.R. 403.
62. See Kwamena Bentsi-Enchill, "The Colonial Heritage of Legal Pluralism" ZLJ, Vol.1 (1969), pp.19-20.
63. Marungo v. Induna Nalubutu (1960), R. & N.L.R. 677.
64. Per Patterson, C.J., ibid., at p.687.
65. (1919) AC.211, at pp.233-234.

66. See Hoover, Piper and Spalding, op.cit., pp.7-8.
67. See Articles 35, 36, 39, 40, 41, 43 and 44.
68. See Proviso to S.17.
69. Colonial Office Records 743, Nos. 1 and 2.
70. Section 2.
71. M. Wight, British Colonial Constitutions (Oxford, 1952), p.7.
72. (1960) IQB, p.241.
73. Ibid.
74. (1910) 2KB, p.576.
75. See Wight, op.cit., p.8. See also VisCount Haldane in the Privy Council judgment of Sobhuza v. Miller (1962), AC.518.
76. British Rule and Jurisdiction Beyond the Seas, (1902), p.165.
77. Article 6.
78. Article 7.
79. Article 12.
80. Up to 1946 its membership consisted of five senior officials - the Chief Secretary, the Attorney-General, the Financial Secretary, the Secretary for Native Affairs, and the Director of Medical Services.
81. See CMD.1471.
82. Established pursuant to Article 19 of the Northern Rhodesia Order in Council, 1924.
83. Proclamation No.3 of 1924.
84. Legislative Council Debates, 23rd May 1924, col.3.
85. See Articles 3, 4, 5, 6 and 7 of the Northern Rhodesia (Legislative Council), 1924.
86. Attorney-General for Nova Scotia v. Legislative Council of Nova Scotia (1928), AC.107, at p.115.
87. Article 20 of the Northern Rhodesia Order in Council, 1924.
88. Wight, op.cit., p.20.

89. For a detailed discussion of this theme see Wight, ibid., pp.18-21.
90. Supra.
91. See Article 40.
92. See Article 42.
93. See Article 43.
94. See Article 36.
95. See Article 37.
96. See Article 41.
97. CMD.3575. See J.W. Davidson, The Northern Rhodesia Legislative Council (London, 1947), for an extended discussion on this memorandum, at pp.69-73.
98. Address delivered by his Excellency the Governor at a meeting held in the Governor's office, Livingstone, on Monday, 27th October 1930, and printed as an appendix to the Legislative Debates, No.12. For a continued debate by members of the Legislative Council, see Davidson, ibid., pp.69-89.
99. S.23.
100. Article 25(1) of the Northern Rhodesia Order in Council, 1924.
101. Article 23 of the Royal Instructions of 26th February 1924. See also Article 18 of the Northern Rhodesia (Legislative Council) Order in Council, 1924.
102. (1931-37) L.R.N.R 13.
103. Article XXI, and also see Section 11 of the High Court Ordinance, 1933.
104. (1910) 2 KBD.
105. (1959) 1QB, p.241.
106. 3E and E.487.
107. Ibid.
108. At p.246, ibid.
109. At pp.302-3, ibid.
110. Government Notice No.81 of 1959.

111. See Chapter 4.
112. See Report of the Inquiry into all the Circumstances which gave Rise to the Making of the Safeguard of Elections and Public Safety Regulations, 1959, Government Printer, Lusaka, p.16.
113. Ibid.
114. Government Notice No.81 of 1959.
115. See S.3(1) and S.9 of the Regulations
116. See S.4(1)(2)(3) of the Regulations.
117. See S.6 of the Regulations.
118. See S.7 of the Regulations.
119. (1959) 11, R. & N.L.R. p.366.
120. Ibid., at p.343.
121. See Report of an Enquiry, etc., op.cit., p.19-25.
122. (1962) R. & N.L.f., p.344.
123. Section 53 of the Penal Code provided that any person who:
a) conspires with any other person or persons to do any act in furtherance of any seditious intention common to both or all of them; or
b) prints or publishes any words or writing with a seditious intention; or
c) sells, offers for sale, distributes or has in his possession any newspaper, book or document containing any seditious words or writing, or any newspaper, book or document the importation of which has been prohibited, or which has been declared to be a seditious publication;
.....
is guilty of a misdemeanour and is liable to imprisonment for two years.
124. See also R.V. Aspinall, 13 Cox C.C. 563.
125. (1886) XII T.L.R. 510. The case is also discussed by Dr. Aihe, ZLJ, Vol.s 3 and 4, (1971 and 1972), pp.46-47. See also R. v. Caunt, The Times, 18th November 1947.
126. 7th Edition 1926, Article 125.
127. (1959) R. & N.L.R. 123.

128. See S.22(2) of the Zambian Constitution, 1964.
129. (1957) R. & N.L.R. 523.
130. (1940) AC.231 at p.240.
131. See Halsbury, 3rd Edition, Para.1054; also Stephen's Digest of the Criminal Law, Article 114.
132. See Report of the Advisory Commission on the Review of the Constitution of Rhodesia and Nyasaland, CMD.1148, Chapter 11, infra.
133. Ibid., p.80.

CHAPTER 4

THE CONSTITUTIONAL BACKGROUND TO THE EVOLUTION OF THE ZAMBIAN BILL OF RIGHTS

It is notable that the bill of rights was first introduced in Northern Rhodesia (as Zambia was then called) with the adoption of the constitution which established self-government in 1963.¹ The bill of rights occupied the first chapter of that constitution. A year later, in 1964, when the leaders of the nationalist parties of Northern Rhodesia and the representatives of the British Government were engaged in negotiations for provisions to be included in the Independence Constitution of Zambia, it was agreed that "the provisions of the Independence Constitution relating to human rights should be in the same form as those in Chapter I of the present constitution (i.e. the self-government constitution"² - although, of course, some few modifications were suggested and made. In 1973 too, when Zambia introduced a one-party state, President Kaunda had specifically directed the National Commission charged with the task of working out the One-party Constitution that in this constitution "the fundamental rights and freedoms of the individual shall be protected as...provided under Chapter III of the Constitution of the Republic of Zambia"³ Thus, unlike in many African states, a bill of rights in Zambia has been a permanent feature of its Constitution(s) since 1963.

The purpose of this Chapter is to explain the political situation obtaining in Central Africa before 1963 which prompted the constitutional protection of human rights in Zambia as a solution to the then current problems.

A. Origins⁴

The immediate political factor in Northern Rhodesia, and Central Africa as a whole for that matter, which gave rise to demands for constitutional safeguards as a means of allaying fears of domination of one race by another, was the creation of the Federation of Rhodesia and Nyasaland in 1953, and the fact that the Federation was operated by whites of mostly Southern Rhodesia on racial lines.

The Federation of Rhodesia and Nyasaland had total population of some 8,000,000 people. The great majority of these were Africans numbering about 7,000,000 against a white population of 297,000. Most of these whites had their homes in the Federation and formed a permanent community. There were also some 25,000 Asians and 13,500 members of the coloured community.⁵

When, in 1953, the British Government brought about the federation of its three Central African territories - Southern Rhodesia (now Rhodesia), Northern Rhodesia (now Zambia), and Nyasaland (now Malawi) - it wrote into the new constitution a promise that the emergent nation would:

"....conduce to the security, advancement and welfare of all... inhabitants, and in particular would foster partnership and co-operation between (the) inhabitants...."⁶

Yet when the federal rule was established, it produced exactly the opposite to this ideal. The federal government was dominated and controlled almost exclusively by whites, especially those in Salisbury. This naturally aroused fears in the Africans, who now came to regard the federal scheme as a machinery designed to subordinate their interests to those of the whites and to put a brake on their (the Africans') political advancement.

The British Government's agreement to incorporate some form of constitutional guarantees, such as a bill of rights and other institutional safeguards, in the Federal and the three Territorial Constitutions of the Federation after 1960, was a means of trying to solve the political problems of a multi-racial Central Africa and, more specifically, a means of "allaying the years of domination" of the Africans by the whites.⁷

Therefore, before discussing how the Zambian bill of rights emerged from this situation, it is pertinent to note the dimensions of federal politics and its impact on the movement of African agitations which eventually ripened into demands for a constitutional entrenchment of human rights to protect the "weaker communities".

i) Background to the creation of the Federation of Rhodesia and Nyasaland

The question of "closer association" between the three Central African territories of Southern Rhodesia, Northern Rhodesia and Nyasaland was already a live issue among the white settlers in Southern and Northern Rhodesia by the 1930's.⁸ While the two northern territories of Northern Rhodesia and Nyasaland were both protectorates ruled directly by His Majesty's Government in the United Kingdom through the Colonial Office, Southern Rhodesia had already attained the status of a self-governing colony.

By Letters Patent of the 1st September 1923, Southern Rhodesia was provided with a responsible government constitution, which came into force on the 1st October 1923.⁹

This constitution formally bestowed internal self-rule on Southern Rhodesia - in effect self-rule for the whites in whose hands the government of the country was exclusively placed. The 1923 Constitution for Southern Rhodesia also provided for a typical "Westminster export model" legislature, which consisted of a Legislative Assembly composed of thirty members representing white electoral districts. Africans under this arrangement did not qualify to be members of the Legislative Assembly, neither were they eligible to vote. There was to be a cabinet whose members were selected from the Legislative Assembly and headed by a Prime Minister. The Governor remained for the most part as the King's representative, and as such was an imperial officer. Though the whites of Southern Rhodesia had gained a considerable autonomy in the administration of internal matters, Britain still controlled the colony, especially through the powers of disallowance of certain legislation passed by the colony's Legislative Assembly. External affairs of the colony were also controlled by Whitehall. However, on the whole, the whites of Southern Rhodesia were in effective control of the colony and it was their longstanding ambition to extend their area of influence to the northern territories, especially to Northern Rhodesia.

Thus the campaign for "closer association" was mostly waged and agitated by the white settlers of Southern Rhodesia (though the white community of Northern Rhodesia

was also equally active) who saw obvious economic and political advantages from an enlarged Central African territorial unit. The most publicized reasons to justify closer association were mainly economic, and with this was the desire by the white settlers in Southern Rhodesia to see the mineral riches of Northern Rhodesia come under their control from Salisbury. Closer association was, for example, urged on the ground that once implemented it would yield an economic independence of the three territories, whose economies were seen to be "complementary", and that by unifying the economic policies of the three territories, it would be easier to secure maximum economic development of the area as a whole in the interests of all the people. Such a unified entity would also, it was contended, be stronger in defence. It was also envisaged that such public utilities as rail, trunk roads and air communications would be improved if they were planned on a broader basis. Other advantages of closer association envisaged included the view that this would promote the most efficient use of the capital of the whole region in finance, raw materials, power, labour and technical skill. Such an expanding economy would quickly promote the social advancement of Africans too.¹⁰

In the light of the white settlers' agitations for closer association, the British Government appointed a Royal Commission in 1938 under the chairmanship of Lord Bledisloe,

".....to enquire and report whether any, and if so what form of closer co-operation or association between Southern Rhodesia, Northern Rhodesia and Nyasaland is desirable and feasible with due regard to the interests of all the inhabitants, irrespective of race, or of the territories concerned and to the special responsibilities of our Government in the United Kingdom....for the interests of the native inhabitants".¹¹

The Commission reporting in the following year, took the view that the time was not yet ripe for amalgamation or federation (although it did not consider the federal solution in detail). The main reasons for the Commission's conclusions were the differences in native policy between Southern Rhodesia and the northern territories, their different stages of political and social development, and the financial weaknesses of the northern territories.¹² However, the Commission instead recommended the establishment of consultative machinery, in the form of the Central African Council, with the function of co-ordinating policy and action between the three governments in all matters of common interest. The Council was established in 1945.¹³

In the eyes of white settlers, the creation of purely consultative machinery in the form of the Central African Council was not enough, and the limitations inherent in its functions engendered the revival of the idea of closer association.

On 8th November 1950, the Secretary of State for the Colonies, the Rt. Hon. James Griffiths, stated in the House of Commons, the imperial government's decision for a fresh examination of the problems of closer association for the

three Central African territories.¹⁴ In 1951, a conference of officials of the three Central African governments, His Majesty's Government in the United Kingdom, and the Central African Council, was convened by the Secretary of State. The officials' report argued in favour of closer association and, at the same time, recognized the African opposition to the idea in the northern territories. However, the conference thought that African opinion would turn out to be more favourable, provided the proposed scheme of closer association "contained adequate provision for African representation and adequate protection for African interests",¹⁵ and provided that "the services more intimately affecting the daily life of Africans were outside the scope of the Central Government".¹⁶ It was also at this conference that the idea of "amalgamation" of the three territories was dropped in favour of a less ambitious scheme of "federation", which the British Government would more readily be persuaded to consider.

The officials' conference in London was followed in September 1951, by the Ministerial Conference at Victoria Falls, which was attended by the officials of the Colonial and Commonwealth Offices of the United Kingdom, the Prime Minister of Southern Rhodesia, and by the Governors of Northern Rhodesia and Nyasaland. African representatives from the two northern territories made it clear that they were unable to accept any scheme in which Southern Rhodesia

was closely associated with Northern Rhodesia and Nyasaland. However, they pointed out that Africans would be willing to consider the question of federation on the basis of the Report of the Conference of Officials "after the policy of partnership in Northern Rhodesia had been defined and, as so defined, been put into progressive action".¹⁷

To meet the apprehensions felt by Africans in the two northern territories, that federation might impair their position and prospects, the Victoria Falls conference unanimously agreed that:

"in any future consideration of proposals for federation, land and land settlement questions as well as the political advancement of the peoples of Northern Rhodesia and Nyasaland, both in local and in territorial government, must remain as at present (subject to the ultimate authority of His Majesty's Government in the United Kingdom) the responsibility of the territorial government and legislature in each territory and not of any federal authority".¹⁸

It was further agreed that the protectorate status of the northern territories was to be accepted and preserved, and that this meant that the question of amalgamation of the Central African territories would never arise at any time.¹⁹

And, most importantly, it was at this conference that the principle of partnership between Europeans and Africans was given prominence in the following words:

".....that economic and political partnership between Europeans and Africans is the only policy under which federation could be brought about in the conditions of Central Africa, and....that any scheme of closer association would have to give full effect to that principle".²⁰

It was from this background that the London conference of April-May 1952, was convened to work out the draft ~~constitution~~ to establish what came to be known as the "Federation of Rhodesia and Nyasaland". The final details of the Federal Constitution were completed at the London conference which met in January 1953. The proposed federal scheme embodied provisions implementing the Victoria Falls assurances on African interests pointed out above. The Federal Scheme became the Constitution of the Federation of Rhodesia and Nyasaland, which itself became operative on 3rd September 1953. Thus from that date federation came into existence.

ii) The main institutions of government established under the Federal Constitution

The institution of government which the Federal Constitution established followed the traditional rule of dividing state functions into three, namely the legislative, executive, and the adjudicative.

The legislative power in the Federation was vested in the Federal Legislative which consisted of Her Majesty and the Federal Assembly.²¹ The Federal Assembly consisted of a Speaker and a number of members whose total of thirty-five in the first Federal Parliament elected in December 1953, was subsequently increased by the Constitution (Amendment) Act 1957, to fifty-nine as follows:

- a) forty-four "elected members", of whom twenty-four are returned in Southern Rhodesia, fourteen in Northern Rhodesia, and six in Nyasaland;

- b) eight "elected African members" (four from Southern Rhodesia, and two each from Northern Rhodesia and Nyasaland);
- c) four "specially elected African members" (two each from Northern Rhodesia and Nyasaland); and
- d) three European members "charged with special responsibilities for African interests", of whom one was elected in Southern Rhodesia, and the other two appointed, one each by the Governors of Northern Rhodesia and Nyasaland.²²

The distribution of power in the Federation was such that the Federal ^{Legislature} was vested with a wide area of action as compared to the Territorial Legislatures. This state of affairs posed a politically serious threat to Africans since the Federal Legislature was a European-dominated institution. The Constitution gave the Federal Legislature power to make laws in respect of any power included in the Second Schedule and any matter incidental thereto. The Second Schedule contains two parts, the first dealing with the Federal Legislative list and the second part with the concurrent legislative list. Part one, that is the Federal Legislative List ("being, in relation to any Territory, matters with respect to which the Federal Legislature has, and the Legislature of the Territory has ^{not}, power to make laws"), contained forty-four matters, which included such vital areas as external affairs, defence, immigration, citizenship of the Federation, aviation, banking, transport, primary and secondary education of persons other than Africans, taxes on income and profits on some saleable goods, currency, exchange control, imports

and exports, etc.²³ The Concurrent Legislative List (i.e. "Matters with respect to which both the Federal Legislature and the Legislature of the territory have power to make laws") had only thirty-one matters - and these included subjects like deportation, naturalization, land banks, hire purchase, electricity, scientific and industrial research, road-rail crossing, etc.²⁴

The executive powers of the Federation lay in Her Majesty's purview, and was exercised on her behalf by the Governor-General.²⁵ Federal executive authority was naturally limited only to the execution of the laws passed by the Federal Legislature within its competence. The Governor-General appointed Prime Minister and other Ministers of the Federal Government, and assigned functions to those Ministers.²⁶ The Prime Minister and the rest of the Federal Ministers were to be members of the Federal Assembly. An Executive Council was established to advise the Governor-General in the government of the Federation, consisting of the Prime Minister of the Federal Government and other persons who must be Ministers in the Federal Government.²⁷ The appointment of Ministers to this Executive Council was made by the Governor-General acting on the recommendations of the Prime Minister. In effect, the Executive Council consisted of all the Ministers of the Federal Government, except former Ministers.

Finally, the Federal Supreme Court²⁸ was established and was given exclusive jurisdiction to determine any dispute between the Federation and a Territory or between Territories inter se and to determine any question as to the interpretation of the Federal Constitution. The Court also had jurisdiction to hear and determine appeals from the High Court of any Territory on any question as to the interpretation of any provision of the Federal Constitution or that of the Territory.

iii) Protective provisions or safeguards under the Federal Constitution

One of the most controversial issues at the creation of the Federation in Central Africa was undoubtedly the problem of safeguarding African interests in the face of wide legislative powers conceded to the white-controlled Federal Legislature. The British Government was aware of this problem, and accepted its role as a protector of African interests. Moreover, the British shared the Africans' fear that the white influence of Southern Rhodesia would slow down the independence of Northern Rhodesia and Nyasaland, and that in the Federal Government the power of the Europeans would be dominant, without any effective check by Her Majesty's Government in Britain. Consequently, two control mechanisms on the activities of the Federal Government were established in the Federal Constitution; viz., firstly, the traditional technique of imperial supervision through disallowance and reservation of Bills, and, secondly, control through the new

"African Affairs Board" as a constitutional organ specifically charged with the responsibility of protecting the interests of Africans in the federal sphere.

a) Imperial supervision of the Federal Government's activities

The first point to note about the Constitution of the Federation is that the British Government only meant it to be an interim one (and never a permanent one) whose continued existence depended on whether it was capable of achieving the objects stated therein and of its preamble, and of creating "a stable and lasting form of association between the three territories". This is partly borne out by the fact that the Constitution of the Federation was annexed to an Order in Council, made under an enabling Act of the United Kingdom Parliament - the Rhodesia and Nyasaland Federation Act, 1953; and Article 29(7) of the Constitution saves any power of Her Majesty conferred by an Act of the UK Parliament to legislate for the Federation: which power could extend, of course, to revoking the Constitution in whole or part. This provision should also be read together with the final Article in the Constitution - Article 99 - which also confirms that the Constitution was meant to be an interim one only. Under this Article a conference must be convened "not less than seven nor more than nine years" from the date on which the Constitution came into force for the

purpose of reviewing the Constitution. And as ~~Maddison~~ ^{Maddison} points out, "there would seem to be no limit to the field of review, and,....the United Kingdom Government might feel bound to use its power of legislation to implement the recommendations of the conference".²⁹

The assertion that the United Kingdom Government retained the power to dissolve the Federation, if it failed to achieve any of its set goals for the purposes of assessing the imperial government's protective role with regard to the African inhabitants, was made clear by a commentary from the office of the Secretary of State for the Colonies in 1963 on the subject of the withdrawal of Nyasaland. The commentary read as follows:

".....It was, of course, the purpose and desire of Her Majesty's Government in endorsing the Federal scheme in 1953 that a stable and lasting form of association between the three territories should be created. This was clearly and publicly stated at the time. Her Majesty's Government, however, were in no position to give and did not give any undertaking of guarantee as to its permanency".³⁰

Again, continued the commentary:

"The responsibility of Her Majesty's Government for the inhabitants of Nyasaland as a territory under the special protection of Her Majesty remained unimpaired by the establishment of the Federation. In the new circumstances that have arisen, namely the expressed wish of the majority of the inhabitants of the territory to withdraw from the Federation, it would in the ^{view} of Her Majesty's Government be a breach of its obligations to the people of the Protectorate to disregard that wish....."³¹

In view of this it could be said that the United Kingdom Government armed itself with sufficient legal power for an effective overall supervision of federal activities, and for it to be able to assert its role as the ultimate guarantor of the interests and rights of Africans in the Federation. Moreover, as the above-quoted Colonial Office commentary implied the Federation was established as an experiment to test whether it could achieve any of the goals which were expressed in the preamble to its Constitution. The most important of these aims is that the Federation would "conduce to the security, advancement and welfare of all their inhabitants, and in particular would foster partnership and co-operation between their inhabitants and enable the Federation, when those inhabitants so desire, to go forward...towards the attainment of full membership of the Commonwealth....."³²

b) Retention of Protectorate status by the two northern territories as a safeguard

Undoubtedly the retention of the Protectorate status of Northern Rhodesia and Nyasaland at the time of the establishment of the Federation constituted an important political safeguard to Africans, as later events proved. It enabled the two territories to hasten towards self-government and eventually to full independence. But how?

It will be recalled that at the Victoria Falls Conference of 1951, which examined the best form of "close association" likely to meet the requirements of

Central Africa, "amalgamation", which had all along been advocated as a basis for closer association, was rejected in favour of a "federation".

"Southern Rhodesia is a self-governing colony. Northern Rhodesia and Nyasaland are protectorates. If the three territories were to be amalgamated, they would all become merged in the new self-governing state. Northern Rhodesia and Nyasaland would thus lose their separate identity (which they would retain in a federation) and this would mean that His Majesty's Government would have to disregard obligations which, by virtue of treaty or otherwise, they have assumed towards the two northern territories. This they cannot do".³³

In the event, the Victoria Falls Conference agreed that the Protectorate status of the two northern territories should be accepted and preserved, and that this excluded any consideration now or in the future of the amalgamation of the three Central African territories, unless the majority of the inhabitants of the three Territories desired it. So with this, the Constitution of the Federation was constructed in such a way that its preamble gave an express recognition to the fact that the Federation's component territories should remain separate and distinct political entities, independent of the Federation within their respective spheres, and continue to be under the special protection of Her Majesty.

The fact that the protectorate status was retained by the territories under consideration after the creation of the Federation, did not please the white settlers. The whites had already set their eyes towards achieving dominion status as a federation, and therefore the

granting of self-government to Northern Rhodesia Nyasaland was inherently at variance with that ambition. To be sure, had the two northern territories lost their Protectorate status by being amalgamated with Southern Rhodesia, self-government, not to mention full independence, would not have been achieved in these territories as early as it did come.

In the second place, the fact that Northern Rhodesia retained its Protectorate constitution, which we have already discussed in the last chapter, meant that all those built-in safeguards for Africans contained in the Order in Council and the Royal Instructions remained untouched and unimpaired. The only adverse effect on them was that the creation of the Federation and the vesting of an exclusive legislative list in its sole competence, stripped away a substantial area of controllable legislative and executive activities from its territorial sphere.

c) Disallowance and Reservation

Ultimate control of federal legislative activities by the imperial government was also expressed through the constitutional provisions in connection with the power of disallowance of federal laws and reservation of federal bills.

Article 25 of the Constitution provided that "Her Majesty may through the Secretary of State disallow" within twelve months any law of the Federal Legislature assented to by the Governor-General, and that any law so disallowed shall be annulled. This power was never used in the whole life of the Federation. The power of disallowance also appears in the Federal Constitution in a special form in Article 77 in connection with the functions of the African Affairs Board which is discussed below.

Reservation of certain categories of bills passed by the Federal Legislature for the signification of the Secretary of State for the Colonies is provided for under Article 24 of the Federal Constitution. Under this Article three classes of bills passed by the Federal Legislature were mandatorily made subject to imperial final decision with regard to their assent. These were all bills

- i) with respect to the election of the members of the Federal Assembly, including provisions for the qualifications and disqualifications for election, qualifications and disqualifications for registration as a voter and voting at elections, delimitation of electoral districts and certain kindred matters;
- ii) in respect of which the African Affairs Board presents to the Speaker of the Federal Assembly a written request that the bill be reserved for the signification of Her Majesty's pleasure on the ground that it is a "differentiating measure"; and
- iii) all bills for the amendment of the Constitution.

The reserved power under the Constitution was only invoked with regard to the functions of the African Affairs Board, and in all cases the British Government gave assent to bills which were otherwise labelled as "differentiating measures" by the Board. This subject should now be discussed in depth in connection with the establishment - and protective role - of the African Affairs Board under the Federal Constitution.

d) The African Affairs Board³⁴

The African Affairs Board was undoubtedly the most important and interesting feature of the Federal Constitution from the point of view of guarding against the passage of legislative measures detrimental to the interests of Africans in the federal sphere. The idea of devising an institution in the nature of the African Affairs Board arose out of the recognized need for some form of constitutional safeguards intended to safeguard the interests of Africans who were, in effect, given a politically inferior place in the Federation to the whites. It was essentially because of this that Africans had consistently opposed the idea of federation.

Moreover, as we have indicated in the preceding paragraphs, when the Federation was established, a considerable amount of legislative power was conceded to the Federal Legislature, and considering

that the Federation was run to satisfy the needs and aspirations of whites,³⁵ it would not be out of place to imagine that discriminatory legislation and executive actions were to be anticipated. Thus, when the Constitution of the Federation was drawn up, the African Affairs Board was established as a Standing Committee of the Federal Assembly, and its specific function was to scrutinize bills passed by the Federal Assembly, including statutory instruments made by the Federal authorities whose effects were disadvantageous to the interests of Africans, and if found to be so, the Board was empowered to reserve such bills or statutory instruments for the signification of the Secretary of State for the Colonies in the United Kingdom. In a sense, therefore, this device for protecting Africans in the Federation also depended on the ultimate authority of the United Kingdom Government to have the final say on the particular bills or statutory instruments assailed as discriminatory.

The composition and functions, and other related matters, were dealt with in Chapter VI of the Federal Constitution. The Board was to be composed of six members, and all of these members were to be members of the Federal Assembly. Its members were the three European members whose duties were to look after the interests of Africans, and one member from each of

the three territories who was to be an African elected by a majority vote of all the African members of the Federal Assembly and the three Europeans referred to in the first category of membership. Among these six members the Governor-General, "at his discretion", appointed a chairman and a deputy chairman.

Article 70 defines the first general function of the Board, namely, to make representations to the Federal Prime Minister, or through him to the Executive Council, in matters within the legislative or executive authority of the Federation as the Board may consider to be desirable in the interests of Africans. Secondly, if the government of any territory so requests, to give that government any assistance which the Board may be able to provide in relation to the study of matters affecting Africans, and in particular assistance in the exchange of information relating to any such matter.

Article 71 dealt with the more particular functions of the Board with respect to the federal legislation. It reads,

"It shall be the particular function of the Board to draw attention to any Bill introduced in the Federal Assembly and any instrument which has the force of law and is made in the exercise of power conferred by a law of the Federal Legislature if their Bill or instrument is in their opinion a differentiating measure".

Immediately below this provision, the Constitution defined the expression "differentiating measure" to mean

"Bill or instrument by which Africans are subjected or made liable to any conditions, restrictions or disabilities disadvantageous to them to which Europeans are not subjected or made liable, or a Bill or instrument which will in its practical application have such an effect".

To enable the Board to execute this particular function, the Constitution, by Article 73, provided that a copy of every proposed bill was to be sent to the Board, unless the Governor-General certified that the bill was urgent or was one which the public interest dictated should not be published before introduction to the Assembly. If, at a later stage, during the passage of any bill through the Federal Assembly that bill was, in the opinion of the Board, a differentiating measure, the Board could lay before the Assembly a report on the bill stating their reasons for considering the bill to be such a measure.³⁶ It was further provided that if at any time after such a report as referred to above has been laid the Board no longer considered the bill to be a differentiating one, they could lay before the Assembly a further report to that effect.³⁷ Indeed, the mere laying of the report had no constitutional significance, but the following Article completes the story. This provides that if on the passage of the bill the Board felt that

the bill was differentiating, it could present to the Speaker of the Assembly, a request in writing that the bill shall be reserved for the signification of Her Majesty's pleasure, and send the Board's request to the Secretary of State together with the bill.³⁸ This request was also to include the reasons in the opinion of the Board why the bill was a differentiating measure.

Further, if the decision to make the request was not obtained unanimously by the members of the Board, this fact was also to be stated in the request. In two instances the Governor-General might give assent to the bill notwithstanding the request of the Board: if he satisfied himself that it was not a differentiating measure, and that the reasons given by the Board for considering it as such were of an irrelevant or frivolous nature, or if he satisfied himself, upon representations made by the Prime Minister of the Federation, that it was essential in the public interest that the bill be brought into immediate operation.³⁹ But if the Governor-General did assent to a bill in these circumstances, the Constitution required him to send forthwith to the the Secretary of State the bill to which he had assented, together with the Board's request and a statement of his reasons for assenting.⁴⁰ The Secretary of State could, of course, disallow such

such a bill even though the Governor-General had assented to it. In other words, Article 25 of the Constitution, which we have discussed in relation to the imperial government's power of disallowance, came into operation.

Further, the effect of Article 97 of the Constitution was of great importance to the role of the Board with regard to amendments of the Federal Constitution. This Article in effect implemented the imperial government's intention to see to it that "Her Majesty's Government and Parliament" must "have the last word on constitutional amendments" in the federal sphere.⁴¹ Thus the Article provided for the automatic reservation of any bill amending the Constitution, and enabled the United Kingdom Parliament to veto the bill if objected to by a territorial legislature. Similarly, if the Board requested that such an amending bill be reserved as a differentiating measure, this power of veto came into play.

Article 97 dealt with the functions of the Board with respect to subordinate legislation in the federal sphere. It provided that if any instrument which has the force of law and was made in the exercise of a power conferred by a law of the Federal Legislature, was in the opinion of the Board a differentiating measure, the Board could at any time within thirty days after the publication

of the instrument send to the Prime Minister a report in writing to that effect stating the reasons why in the opinion of the Board the instrument was such a measure. Upon receipt of the Board's report, the Prime Minister was, within thirty days, to send the same, with his comments, to the Governor-General, who would forward the report and the comment to the Secretary of State. The Secretary of State again had the last word on the fate of the statutory instrument in question, and could disapprove of the instrument.

These then were the functions and powers conferred by the Federal Constitution on the African Affairs Board, and although these were fairly broad in scope, the actual operation of the Board within its nine years of existence disappointed Africans, and subsequently failed to win their confidence as an effective check on discriminatory legislation in the Federation. The Monckton Commission in its report on the Federation in 1960, remarked on its declining prestige as follows: that

"The African Affairs Board has in recent years lost the confidence of the Africans. The Board's prestige and usefulness were seriously injured when it tried unsuccessfully to keep the Federal Constitution Amendment Act of 1957 and the Federal Act of 1958 off the Statute Book. In the eyes of many this was a convincing proof of the Board's ineffectiveness as a safeguard".

Even before this time, and indeed as early as 1955 or before, when the Federation was still in its infancy, the African Affairs Board had been criticized as inadequate by the Africans themselves. In a "Memorandum on the Representation of Africans and Other Races in the Federation.....", sponsored by the Northern Rhodesia African National Congress, the African Affairs Board was attacked as ".....not having been an effective check on discriminatory legislation in the Federation". The Memorandum went on to cite specific instances justifying the Board's weaknesses in defence of African interests:

"The Income Tax Act which made the Africans of Northern Rhodesia and Nyasaland liable for income tax for the first time without relieving them of Territorial Native Tax, and the Cadet Corps Act which excluded Africans by implication from its scope, passed unopposed".⁴³

The Board's prestige was given a final blow by the passage of two Federal Bills referred to earlier on, namely, the Constitution Amendment Bill 1957, and the Electoral Bill of 1958. The relevant background to the successful passage of these bills in spite of the Board's intervention was this: the European politicians in all the three territories, as well as at the Federal level, were now growing restless in moving towards achieving Dominion status for the Federation. In the event, the Federal Prime Minister, Sir Roy Welensky, took

the initiative of securing a number of assurances (in 1957) from the British Government, of which the most relevant one in the present context was that at the Federal Review which was due to take place in 1960, a programme of the Federation's advance towards independence would be one of the items on the conference's agenda, and further that the British Government in the interim would not exercise its right to legislate for the Federation, as provided in the Constitution, except at the request of the Federal Government.⁴⁴ Knowing that the British Government would not exercise its power "to legislate" for the Federation, which included not exercising its power of disallowance, reservation, or disapproval, the Federal Government then pushed in those two bills referred to above.⁴⁵ The Constitution Amendment Bill sought to increase the size of the Federal Assembly from thirty-five to fifty-nine, while the Electoral Bill sought to make changes in the methods of elections for Africans in such a way that Europeans would have had a greater control in the elections of African members, for example. The two bills were reserved by the Board under Paragraph (3) of Article 97 and Article 10 respectively for the consideration of the British Government on the ground that they were "differentiating measures" which, if passed into law, would have the effect of undermining the value

of African representation in the Federal Assembly. A lively debate ensued in the House of Commons between Labour MPs and the Conservative Government. Mr. James Callaghan, himself a longstanding ally of African aspirations, cautioned that "if the bill [i.e. the Constitutional Amendment Bill] is approved by the British Parliament, the African Affairs Board is seriously discredited in African eyes..."⁴⁶ The House of Commons' debates on both Bills finally ended with Parliament approving them and thereby rejecting the findings of the Board. In view of the assurances given in favour of the Federal Government (as mentioned above), this verdict was not unexpected. The damaging effect which the approval of these bills by the United Kingdom Parliament had on the African Affairs Board, in the eyes of all, was vast and was neatly summarized by the Rev. Andrew Doig, the European member of the Board from Nyasaland, who himself resigned from the Board in protest at Britain's flagrant and discrediting behaviour towards the Board. He wrote:⁴⁷

"I think that we have reached a crisis in the affairs of the Federation. If the British Government are prepared to pass this Constitutional Amendment Bill in the face of almost complete opposition of the African Affairs Board, then they will pass anything in the future. It has always been my view that the Conservative Government at least would never refuse the Federal Government anything, and their agreement to the Amendment Bill

will not only be the end of any faint confidence the Africans had in the African Affairs Board, but opens the door to complete control in the end of all three territories by the Federal Government with the certainty of a negligible voting power in the hands of Africans".

The Monckton Commission realized that nothing could be done to revive the reputation of the Board, and although it did not recommend its total abolition, it expressed its wish to improve upon the Board and for it to emerge under a different guise with a different structure and functional features.⁴⁸ Moreover, that aspect of the Board's function which covered review of legislation only in relation to the interests of Africans was criticized, and a suggestion was popularized whereby the substitute institution of the Board should cover legislation affecting the interests of all the races.

The most important period in the constitutional history of Northern Rhodesia and in particular with reference to the constitutional guarantee of human rights, followed the publication of the Report of the Monckton Commission in 1960. The Report criticized many aspects of the Federation's constitution and made radical recommendations designed to restore the image of the Federation which was so tattered in the eyes of many to the extent that the Monckton Commission convincingly stated that "it could not be made to succeed in its present form". Moreover, it was this Commission's Report which brought out the compelling need for some

"legal and political safeguards" to be included in both the future Federal and Territorial Constitutions.⁴⁹ In particular, it recommended a bill of rights to be incorporated in both sets of constitutions. The Commission's Report in relation to this relevant subject should now be discussed in some detail.

B) Impact of the Monckton Commission's Report on the Constitutional incorporation of a bill of rights.

We have already referred to Article 99 of the Federal Constitution, which provided for the review of that Constitution "not less than seven nor more than nine years from the date of its coming into force". The date of the Review Conference was fixed to be in 1960 - that being the earliest possible time for it under the Constitution. In anticipation of this Conference, the British Government appointed a Commission in 1959, which was chaired by Viscount Monckton, to advise on the review of the Constitution of the Federation of Rhodesia and Nyasaland.

The Commission, reporting the following year, disclosed that "the dislike of federation among Africans in the two Northern Territories is widespread, sincere, and of long standing. It is almost pathological".⁵⁰ The Commission attributed the fundamental origin of African hatred of federation to lie in the racial discrimination which the white-dominated Federal Government helped to promote by its actions. Thus the Report remarked:

"Throughout our tours of the three Territories we heard much evidence of racial discrimination. Such discrimination operates mainly to the disadvantage of non-Europeans, particularly Africans, and is one of their basic grievances".⁵¹

Thus one of the formidable problems which the Commission was confronted with was to advise the British Government on a solution to the problem of "racial partnership" in the future constitutional arrangement of the Federation. The Commission in its report confessed that:

"Many of the witnesses who appeared before us insisted that, before federation went forward to full membership of the Commonwealth, new or more effective safeguards should be provided and fundamental human rights guaranteed. We agree with this view. We believe that it is essential to improve existing safeguards, to devise new ones, and to ensure that their effectiveness continues".⁵²

In consequence, the Commission recommended two sets of safeguards, which it described as the "legal" and the "political" safeguards to be included both in the Federal and Territorial Constitutions.⁵³ Bills of rights represented the legal safeguards, and an improved upon variant of the African Affairs Board - now to be known as the Council of State - represented the political safeguards.

i) Bill of Rights

In recommending the inclusion of a bill of rights in the Constitution of the Federation, the Commission argued that this would promote "greater security" among all peoples of the Federation, and more important, that such a bill would:

"(a) help to allay the fears of domination which disturb the main section of the population, and give them greater confidence in the future:
 (b) provide a criterion or standard upon which institutions, whether political or judicial, could base their protection of the people's rights; and
 (c) guard the liberties of all persons whether they were Federal citizens, British citizens, British protected persons or aliens".⁵⁴

Paradoxically, the Commission recommended the bill of rights to be something on the lines of the Canadian model⁵⁵ - although it seems that the Commission cited this by way of illustration only. Nevertheless, the recommendation of the Majority Report to base the bill of rights on the Canadian precedent prompted a sharp reaction by the two African members of the Commission (one from Northern Rhodesia and the other from Nyasaland) who, in a Minority Report,⁵⁶ argued against adopting the Canadian Bill of Rights as a model for the Federal and Territorial bills of rights on two grounds. Firstly, they argued that the Canadian Bill of Rights was of limited legal effect in that it provided no more than rules of construction with regard to the ordinary legislation. Secondly, the Canadian Bill of Rights contained a proviso permitting the rights and freedoms declared in the Bill to be abrogated by the express provisions of a subsequent Act of Parliament.

An alternative suggestion of the type of bill of rights appropriate to the circumstances of Central Africa, was one of following the European Convention

for the Protection of Human Rights, which was the basis of provisions already included in the Constitution of Nigeria, as noted in our first chapter. One advantage of a bill of rights based on the European Convention or on the Nigerian model was that it would operate to invalidate any law on the statute book which was inconsistent with its provisions. This would have satisfied African apprehensions since the white-dominated legislature of the Federation would be checked by the judiciary if it endeavoured to pass discriminatory legislation.

A recommendation ought also to have been made that in the specific conditions of the Federation, where the Commission found that discrimination was practised in the social, economic and commercial fields, a bill of rights ought to have contained provision for an express prohibition of racial discrimination in those fields.

ii) Councils of State

The commission in urging a constitutional incorporation of some political or institutional safeguards in addition to a bill of rights, made out a very relevant recommendation, taking into account the then prevailing political circumstances of Central Africa. It asserted:

"A Bill of Rights, however comprehensive, will not by itself provide a completely satisfactory safeguard for the inhabitants of the Federation. There remains the problem peculiar to a multi-racial state, that of discrimination on grounds of race, colour or religion. This is a matter of deep and anxious concern to both Africans and Europeans. Discrimination, open or disguised, is present in many kinds of human activity and may occur in a wide range of laws and executive actions. It is often harmful, but it may at times be beneficial where it is used to protect the interests of weaker classes or groups. To distinguish between beneficial and harmful discrimination is a difficult and delicate task which the Courts cannot appropriately be asked to undertake. We believe that this is a political problem for which a different safeguard is needed. In addition to a bill of rights there should be established a political body specially charged with the prevention of unfair discrimination..."⁵⁸

For this purpose the Commission recommended the creation of Councils of States⁵⁹ in both the federal and territorial constituencies. The Councils of State were to be modelled on the lines of the Council of State in Kenya which was created in 1958 as a means to solve the racial problem in that country. The Commission made a number of suggestions as to the guiding criteria in making appointments to the Councils, and finally concluded that appointment to them should be made without regard to race - although this approach also had its shortcomings. The recommended functions of the Councils of State included the duty of reviewing proposed legislation with power in their respective

constitutional spheres to delay its passage through the Legislature if it was found to be unfairly discriminatory; the Councils of State were to be empowered to review existing legislation and, for this purpose, to recommend the introduction of legislation to remove existing unfair discrimination; further, the Councils of State were to perform the function of examining and reporting on any unfairly discriminatory trends that may develop. The Commission would then recommend a variety of things connected with the functions of the Councils, such as the procedure to be adopted in the performance of their functions.

The point ought to be made here that in recommending the creation of the Councils, the Monckton Commission wanted only to revive the African Affairs Board in a different form and with some suitable modifications. Thus, unlike the African Affairs Board, the Councils were to guard against discriminatory tendencies directed not only against Africans, but against all races. Further, the scheme of Councils, unlike the Board, embraced the examination of all proposed and existing legislation (including subsidiary legislation) both in the territorial and federal spheres. The composition of the Councils was to consist of persons outside Parliament and not

members of Parliament, as was the case with regard to the membership of the Board. This meant that the Councils were to be independent of the legislature, but without the power to veto proposed legislation by the legislature.

"The provisions relating to the Bill of Rights and the Council of State", urged the Commission, should "be specially entrenched".⁶⁰ The idea was that amendment of the Constitution in respect of the provisions containing the safeguards should not be easily obtained, for this would place these safeguards at the disposal of the legislature. The Commission therefore recommended a special procedure for the legislature to secure alterations of the protective provisions, namely by

"(a) an affirmative vote of not less than three-quarters of all members of the legislature; and
(b) a referendum in which a majority of electors in each of the main racial groupsapprove the proposed amendment".⁶¹

c) Implementation of the Monckton Report:
The 1963 Northern Rhodesia Constitution

The recommendations of the Monckton Commission greatly influenced the British Government's attitude and approach towards the future constitutional development of Northern Rhodesia. For one thing, the detailed examination of the nature of political problems prevailing in the country as part of the Federation enlightened the imperial government enabling it to prescribe the

appropriate constitutional principles to be applied in any future constitutional settlement of the territory. The Monckton Commission also laid down what would be an acceptable constitutional course in Northern Rhodesia. In this respect, apart from the recommendations for the inclusion of a bill of rights and other institutional safeguards in the constitution of the territory, the Commission's next important recommendation for Northern Rhodesia was that

"there should be an African majority in the Legislative Council and an unofficial majority in the Executive so constituted as to reflect the composition of the Legislative Council"⁶²

It also urged the British Government to take immediate practical steps, by convening a constitutional conference, to implement the transition to self-government under an African government. The British Government, having in effect accepted the Commission's Report, in no time convened a Constitutional Conference in February 1961, which Iain Macleod, the Colonial Secretary, said was called "to find an agreed basis for the next constitutional advancement in Northern Rhodesia",⁶³ which "should provide for a substantial increase in the number of Africans in the Legislature".⁶⁴

At the Conference the question of ".....proposals for a Bill of Rights and a Council of State which had been put ^{forward} in the Monckton Report in the Federal context"⁶⁵ was easily pressed upon by the Secretary of

State to form part of the territory's next constitution. Perhaps the persuasive argument of the Secretary of State (Iain Macleod) which he put to the delegates urging a bill of rights, can be repeated here. He said:

"I think the Conference may.....now turn its attention to safeguards, both for the individual and for minority communities. The latter is perhaps of particular importance in a territory which is not yet fully developed and a society which is not homogeneous. Whereas in a developed homogeneous country such as Britain, the protection of minority interests is maintained by certain recognized and traditional conventions, in under-developed and mixed communities special provisions are needed for this purpose, and it has been usual in Commonwealth countries to enact by law safeguards..... Without such safeguards a mass electorate, dominated by a single party, might control all the organs of government, and minority interests could be completely disregarded....."⁶⁶

There is one point which clearly emerged from the above statement regarding the need for legal protection of individual rights in Northern Rhodesia - and this is that the problems which gave rise to the suggestion of a bill of rights in Northern Rhodesia combined those of Nigeria and Kenya. Like Nigeria, Northern Rhodesia was not ethnically homogeneous, nor was it homogeneous in religious terms. There are seventy-three different ethnic groups in the country and politics followed the appeal to tribal support.⁶⁷ Therefore the Zambian situation at this time had all the potential of the Nigerian problem in 1959-60. Like Kenya too, Northern Rhodesia was "the home of many races". Northern Rhodesia had attracted a significant number of whites, mainly from South Africa and Southern Rhodesia, because

of its association with the Federation but, more importantly, because the white personnel were indispensable in running the country's gigantic copper industry, the jointly-owned Rhodesia railway, manufacturing industries, banks, insurance companies, schools, the civil service, and many other public and private enterprises. Based in a relatively sound national economy (by the standards of African states) commercial activities, especially in the retail and wholesale sectors, had attracted a relatively huge number of Asians who completely dominated it. Thus the people of European and Asian races constituted the so-called "racial minorities" whose personal interests needed special protection in the constitutional scheme under consideration.

What was noticeably interesting at the Constitutional Conference of 1961 was that the Secretary of State's suggestion for the constitutional entrenchment of rights was immediately acclaimed by the representatives of the chiefs who also urged that "there should be safeguards for minorities, and that for this purpose there should be a Bill of Rights in the Constitution".⁶⁸ The chiefs are the leaders of the various individual ethnic groups in the territory, and naturally they were apprehensive of a central government composed of people who did not belong to their groups. Their concern for their existence in a totality of the new political community as minorities could therefore be appreciated. However,

this is not to imply that the other delegates who represented the five political parties in the country were not in favour of a bill of rights. As in Ghana (1957), the vitality and importance of the notion of human rights to democracy was already popularized by the nationalists themselves, and was an entrenched feature in their ideology and propaganda. The human rights argument was used in the pre-independence period both as a "sword" and as a "shield". It was used as a sword by the nationalists in attacking the undemocratic foundations of the colonial government because of its continued denial of basic civil and political rights and freedoms to the indigenous people. In other words, colonialism was seen as inherently incompatible with human rights. It was also used as a shield to offset accusations that once in power, the nationalist government might either be autocratic in its actions, or might import communism, which knows of no legal rights to persons and their property. In order to assure ethnic, racial and religious minorities, and to create confidence in the international community at the United Nations, the nationalist parties promised in advance to adopt human rights in the independence constitution. Thus in Zambia, the most dominant African nationalist movement, the United National Independence Party (which subsequently formed the first black government in the country), issued what it called the "Declaration of Fundamental Human

Rights, 1960".⁶⁹ The Declaration purported to promise that the constitution of the territory under UNIP government would safeguard the personal rights and liberties of all individuals. The Declaration read:

"The Constitution shall contain fundamental safeguards guaranteeing the freedom of the individual and providing against abuse of power by the Executive. These fundamental laws will not alone safeguard the members of the country. They are not concessions to any one group or community but rather an expression of UNIP's belief in the dignity and freedom of the individual, and in the principles of justice.....to all".

The rights and freedoms which the UNIP Declaration laid down were principally of the traditional civil liberties-type, plus two or so rights in the realm of social and economic rights. The Declaration, no doubt, drew these principles from the United Nations' Declaration of Human Rights, 1948.

The rights and freedoms formulated in the UNIP Declaration included the right to life, liberty and security of person; equality before the law; freedom from arbitrary arrest, detention or exile save in accordance to law; freedom from interference of one's privacy, family, home, or correspondence; freedom of peaceful assembly and association, including the right to form political parties and trade unions; freedom of expression; freedom of thought, conscience and religion; right to property; protection from discrimination on grounds of race, colour or sex; right to vote and

rights to due process of law. The rights of a social and economic nature mentioned in the Declaration included the right of everyone to a decent standard of living, good health, and the duty of the state to safeguard the economic interests of the weaker members of the community; right to education, which was to be free at least in the elementary stages, and right of parents to choose the kind of education they wished for their children.

The Declaration did not, of course, have any direct bearing on the decision to incorporate a bill of rights in the proposed constitution of the territory, but it does indicate the kind of favourable climate within which the suggestion was made. In any case, by 1961, or more specifically after the Nigerian experience, the policy of the Colonial Office favoured the writing of a bill of rights in any one of the constitutions conferring self-government on the dependent territories. So the suggestion to include a bill of rights in the Zambian self-government of 1963 should also be understood within the larger context of Britain's approach to constitutional settlement with respect to its colonies.

Self-government came to Northern Rhodesia with the adoption of the Northern Rhodesia Constitution, 1963, which was a schedule to the Northern Rhodesia (Constitution) Order in Council, 1963, which came into operation on 3rd January 1964. It is this constitution

which implemented the Monckton Commission's Report with regard to the bill of rights and the Council of State. The "Protection of Fundamental Rights and Freedoms of the Individual" occupied the first chapter in the Constitution, and Chapter Two dealt with the "Constitutional Council".⁷⁰ In the next chapter we proceed to take up the subject of the content and manner of formulation of this bill of rights, which was also reproduced in the independence Constitution of Zambia of 1964.

NOTES

1. Schedule to the Northern Rhodesia (Constitution) Order in Council 1963, S.I. No.2088 of 1963, Chapter 1.
2. See Report of the Northern Rhodesia Independence Conference, 1964, p.5, Cmd. 2365.
3. Report of the National Commission on the Establishment of a One-party Participatory Democracy in Zambia, Government Printer, Lusaka, 1972, p.1X.
4. On this subject see the much detailed accounts of Robert Rosberg, The Rise of Nationalism in Central Africa (Oxford, 1966), Chs. 1X and X; see also, Richard Hall, Zambia 1890-1964 (London, 1965, 1976), Ch.4; Thomas M. Franck, Race and Nationalism (London, 1960), Chs. 2 and 3.
5. Figures derived from the Monckton Report, Cmd.1148, p.12.
6. The Federation of Rhodesia and Nyasaland (Constitution) Order in Council, Preamble, S.I. (11), 1804 (1953).
7. See Report of the Advisory Commission on the Review of the Constitution of Rhodesia and Nyasaland, (the Monckton Commission Report), ibid., generally, Ch.II.
8. See J.W. Davidson, The Northern Rhodesia Legislative Council (London, 1947), pp.93-96. See also generally Rosberg, The Rise of Nationalism in Central Africa, ibid., Chs.IX and X. Also, Richard Hall, Zambia 1890-1964, ibid., Ch.4.
9. For a thorough discussion and analysis of this Constitution see Claire Palley, The Constitutional History of Southern Rhodesia
10. See Report of Conference on Closer Association (London, March 1951), Cmd.8333 at pp.11-12.
11. See Report of the Advisory Commission on the Review of the Constitution of Rhodesia and Nyasaland, Cmd.1148, Para.15.
12. Para.16, ibid.
13. Para.18, ibid.
14. Cmd.8411 of 1951.
15. Ibid. See Annex to Cmd.8411, p.6.
16. Ibid.

17. See Annex to Cmd.8411.
18. Ibid.
19. Ibid.
20. See communique issued after the Victoria Falls Conference on Closer Association of Central African Territories, Cmd.8411, Annex thereto.
21. S.8 of the Federal Constitution, Annex to the Federation of Rhodesia and Nyasaland (Constitution) Order in Council, 1953, as amended in 1957.
22. S.9, ibid.
23. Part I of the Second Schedule to the Federal Constitution.
24. Part II, ibid.
25. S.36(1) of the Federal Constitution.
26. S.37(1) ibid.
27. S.38(1) ibid.
28. S.46(1) ibid.
29. A.C. Macdonald, "The African Affairs Board in the Federation of Rhodesia and Nyasaland", (1959), Public Law, 362 at 370.
30. Para.13, Commentary on Statements relating to the Establishment of the Federation and their Bearing on the Withdrawal of Nyasaland, Cmd.1948.
31. Para.14, Cmd.1948.
32. See Preamble to the Federal Constitution.
33. Para.8 of Report of the Conference held in London to prepare a "Draft Federal Scheme", 1952, Cmd.8573.
34. For further readings on the African Affairs Board, see Y.P. Ghai, "The Kenya Council of State and the African Affairs Board of the Central African Federation: An Experience in the Protection of Minorities", ICLQ, Vol.12 (1963), p.1089 from p.1107. See also, A.C. Macdonald, "The African Affairs Board in the Federation of Rhodesia and Nyasaland", ibid., 362, 364.
35. For the various remarks made by the first Federal Premier, Sir Roy Huggins, suggesting that an African had only a secondary place in the Federation, see Robert Rosberg, The Rise of Nationalism in Central Africa, ibid., Chs. IX and X. In these chapters the author also deals with the basis of African bitterness about how the political and economic affairs of the Federation were run to the advantage of white settlers only.

36. Article 74.
37. Ibid.
38. Article 75(1).
39. Article 75(4)(a) and (b).
40. Proviso to Article 75(4)(a) and (b).
41. House of Commons Debates, Hansard, Col.903, July 27, 1953, quoted in Cmd.1948, Para.11.
42. Para.233, Report of the Monckton Commission, ibid.
43. See Appendix II of Zambia Shall be Free by Kenneth Kaunda (London, 1962), p.174, entitled "The African Affairs Board". This was a "Memorandum on the Representation of Africans and other Races in the Federation of Rhodesia and Nyasaland and in Northern Rhodesia (1952)", prepared by the Northern Rhodesia African National Congress.
44. See David Mulford, The Northern Rhodesia General Election 1962, ibid., pp.8-9.
45. Ibid., p.9.
46. House of Commons Debates, Vol.578, Col.819, quoted by Y.P. Ghai, in "The Kenya Council of State and the African Affairs Board of the Central African Federation", ibid., p.1116.
47. Quoted by Mrs. Barbara Castle from a letter from Rev.Doig, House of Common Debates, Vol.578, Col.888, quoted by Y.P.Ghai, ibid., p.1117.
48. Para.231 of the Commission's Report, ibid.
49. Para.240 of the Report, ibid.
50. Para. 27 of the Report, ibid.
51. Para.219 of the Report, ibid.
52. Para.231 of the Report, ibid.
53. Para.235 of the Report, ibid.
54. Para.235(a)(b) and (c), ibid.
55. In Para.236 of the Report, ibid.
56. See Minority Report by Mr. Chilwa and Mr. Habanyama, pp.151-52, of the Report of the Advisory Commission, ibid.

57. For an analysis of this institution, and especially of its operation in Kenya, see Y.P. Ghai, ICLQ, Vol.12 (1963), p.1089.
58. Para.240 of the Report of the Advisory Commission, ibid.
59. Para.242, ibid.
60. Para.260, ibid.
61. Para.260(a) and (b), ibid.
62. Para.114, p.43, ibid.
63. Cmmd. 1295, p.1.
64. Ibid., p.2.
65. Ibid., p.3.
66. Ibid., p.4.
67. See generally, Tordoff, The Politics of Zambia, op.cit.
68. See Para.7 of Report of the "Northern Rhodesia: Proposals for Constitutional Change", Cmmd. 1295.
69. See Appendix II to The Northern Rhodesia General Election, 1965 by David Mulford, ibid.
70. See the Schedule to the Northern Rhodesia (Consitution) Order in Council 1963, S.I. No.2088, Ch.1 entitled "Protection of Fundamental Rights and Freedoms of the Individual".

PART II

PROTECTION OF HUMAN RIGHTS UNDER
THE ZAMBIAN CONSTITUTION (1964-79)

CHAPTER 5

FORM AND CONTENT OF THE ZAMBIAN BILL OF RIGHTS

In the last chapter we noted the origins of the decision to incorporate a declaration of fundamental rights and freedoms of the individual in the Northern Rhodesian Constitution of 1963 which established self-government in the territory. It was also noted that the provisions protecting the rights and freedoms in that Constitution were reproduced, with minor modifications, in the Republican Constitution (1964) of the Republic of Zambia. This chapter, on the other hand, concerns itself with the contents of the Zambian Bill of Rights and the manner of formulation of the guaranteed rights and freedoms - and in this respect it is to be compared with the corresponding provisions adopted in other Commonwealth African states.¹ It is obvious that the British gave very serious consideration to the form and content of the bills of rights in some African countries, especially in Kenya and Zambia where the political and economic circumstances required considered constitutional arrangements.²

Generally speaking, all the Commonwealth African bills of rights followed a common pattern in the range of the rights guaranteed and the manner of formulating them. In this, they merely reflected their common source which was in the European Convention (Articles 2-11) and the bill of rights in the Nigerian Constitution.³ However, later bills of rights which followed the Nigerian experience (i.e. the 'Neo-Nigerian bills of rights') exhibit some distinctive features which represent improvements in the manner of drafting. One of these features is the presence of a declaratory or an introductory note which precedes the actual provisions guaranteeing the rights and freedoms.

A) The Declaratory Section and its Legal Effects

The Zambian bill of rights, like that of Kenya,⁴ Nyasaland,⁵ and Jamaica,⁶ for example, but unlike the Nigerian bill, contains what is generally referred to as a declaratory section, as a kind of preamble to the substantive sections guaranteeing rights and freedoms. It is difficult to understand the absence of a declaratory note to the Nigerian bill of rights because even the European Convention on Human Rights is preceded by a recital in a preambulatory form reaffirming faith in "those Fundamental Freedoms which are the foundation of justice and peace in the world and.....best maintained.....by an effective political democracy and.....by a common understanding and observance of the Human rights....." and further that "..... Governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the role of law take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration....." However, the preambles to the Neo-Nigerian bills of rights took a different form. The Nigerian bill of rights having failed to incorporate the preambulatory recital, it was Uganda (1962) where such a ^{concept} first appeared as a feature of the constitution.⁷ The Ugandan example was followed by all African constitutions which contained bills of rights. Section 13 of the Constitution of Zambia sets out this preliminary section:

"Whereas every person in Zambia is entitled to the fundamental rights and freedoms of the individual, that is to say the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely:-

- a) life, liberty, security of the person and the protection of the law;
- b) freedom of expression and of assembly and association; and
- c) protection for the privacy of his home and other property and from deprivation of property without compensation.

The provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

In the Zambian case of Nkumbula v. The Attorney-General for Zambia,⁸ the applicant argued, inter alia, that the government's decision to introduce a one-party state would infringe on his freedom of assembly and association "guaranteed under Ss 13 and 23(i)", and that in any case, the introduction of a one-party system of government would be "in contravention of the spirit of the Constitution and in particular Ss 13, 22 and 25..." He asked the court to issue such order, writ or direction "for the purpose of enforcing or securing the enforcement of Ss 13, 22 and 25....of the Constitution...." Quite clearly the applicant in this case was lumping together Section 13, that is the declaratory section, together with the rest of the other substantive provisions for human rights in the Constitution and thereby making it appear as though it also confers enforceable rights or freedom. Chief Justice Doyle, who decided the case in the High Court did not give this matter any extended discussion as to the legal effect of S.13, but merely observed that "Section 13 is merely a general statement of the principles embodied in the following sections..."⁹

An example of a direct and thorough judicial examination of the legal effect of the declaratory section arose in the Kenyan case of Shah Vershi v. Transport Licensing Board.¹⁰ The Kenyan

Constitution, as indicated above, also contained a declaratory section, i.e. Section 70, in exactly the same terms as Section 13 of the Zambian Constitution. In the case cited above the applicant, a company owned by Asians, was refused renewal of some of its transport licences by the Licensing Board. The Board's decision was obviously influenced by the need "to remove imbalance between Kenyan citizens". The applicant challenged the decision of the Board on the ground, *inter alia*, that it denied the fundamental rights given to it by the Constitution of Kenya, and in this respect cited Section 70 (i.e. the declaratory section) in support of his case. Section 70 prohibited "discriminatory treatment" to every individual whether a citizen or a foreigner, yet the ground of refusal to renew the transport licence to the applicant company was based on its being owned by non-Kenyans. The High Court of Kenya ruled that Section 70 of the Constitution created no justiciable rights on its own: Chanan Singh, J., explained the proper effect of S.70 as follows; that

".....although given a separate number, this section is quite clearly in the nature of a preamble..... [The] section itself creates no rights: it merely gives a list of the rights and freedoms which are protected by other sections of the chapter".¹¹

The Court also explained that the word "person" as used in the section includes "any body of persons corporate or unincorporate". This means that a company as the one in this case is a "person" within the meaning of the section and would, ipso facto, be entitled to all the rights and freedoms given to a natural person which it is capable of enjoying.¹²

Earlier, in 1967, in Olivier v. Buttigieg¹³ a case in Malta, which surprisingly was not referred to in the Kenyan case above, the Privy Council gave a neat summary of the true legal character of a similar section - Section 5, Part 11, of the Maltese Constitution. In its opinion the Privy Council declared that:

"..... [Section 5] which begins with the word 'Whereas'..... is an introduction to and in a sense a prefatory or explanatory note in regard to the sections which are to follow..... The Section appears to proceed by way of explanation of the scheme of the succeeding sections. The provisions of Part 11 are to have effect for the purpose of protecting the fundamental rights and freedoms, but the section proceeds to explain that since those rights and freedoms must be subject to the rights and freedoms of others and to the public interest it will be found that in the particular succeeding sections which give protection for the fundamental rights and freedoms there will be 'such limitations of that protection as are contained in those provisions'. the succeeding sections show that the promised scheme was followed. The respective succeeding sections proceed in the first place to give protection for one of the fundamental rights and freedoms and then proceed in the second place to set out certain limitations..."¹⁴

The Ugandan case of Shah v. Attorney-General for Uganda¹⁵ is too of immense interest to the present discussion on the legal effect of what we have, for most of the time, referred to as a 'declaratory section'. The majority opinion in this case was to the effect that an Act of Parliament could be declared invalid on the basis of its provisions being inconsistent with the provisions of the 'declaratory section', even though it was not necessarily incompatible with any of the substantive or operative provisions under the bill of rights. In other words, the case decided that the preamble to the bill of rights possesses legal form independent of the operative provisions that follow to define the rights and freedoms.

The Ugandan Constitution of 8th September 1967, which followed a coup d'etat by Prime Minister Milton Obote, the suspension of the 1962 Constitution and the deposition of the incumbent President of Uganda, the Kabaka of Buganda, contained a bill of rights closely based on the Nigerian model, as was its bill of rights under the 1962 Constitution. That bill of rights, like the Zambian one, had a preamble as a declaratory section introducing the guaranteed rights and freedoms - although the Ugandan declaratory section was differently worded. The relevant provisions to this discussion read as follows:¹⁶

- "8 (2) Every person in Uganda shall enjoy the fundamental rights and freedoms of the individual, that is to say, the rights to each and all the following, namely,
- a)
 - b)
 - c) protection for the privacy of his home and other property from deprivation of property without compensation".

In addition to these provisions protecting, inter alia, property rights in the declaratory section, a later article in the operative provisions of the bill of rights, namely Article 13, dealt specifically with "protection from deprivation of property" and specified a number of conditions which have to be satisfied before dispossession or acquisition of property could lawfully be effected.¹⁷

In this case the petitioner had obtained judgment against the Government of Uganda in a suit founded upon a contract between him and the former Kabaka's Government of Buganda. The Government failed to pay the judgment; in fact the Government through its official in the Treasury responsible for payment refused to accept

the order of the High Court to pay. The petitioner then applied for mandamus on the officials responsible for payment, whereupon the Attorney-General applied to dismiss the application relying on a section of an Act of Parliament, the Local Administration (Amendment) (No.2) Act of 1969, which had been passed after the judgment had been given. The Act purported to deprive a person of the right to litigate on a contract. There was, of course, the argument that the Act did not apply to the petitioner's judgment debt because it dealt only with contracts and that the contract upon which the plaintiff's original suit had been founded had now been merged in the judgment. The High Court of Uganda upheld this view.

Next, the petitioner argued that the relevant provisions of the local Administration (Amendment) Act, 1969, was unconstitutional because it purported to sanction deprivation of property without compensation as provided for under Article 8(2)(c) of the Constitution cited thereabove. In other words, he was claiming that there was invalidity of the statute in question because it offended against Article 8(2)(c) - which was the preambulatory declaration to Chapter III of the Constitution and not Article 13 which constituted the substantive basis of the right against the deprivation of property without compensation.

Jones, J., and Mead, J., both held that the provisions of the impugned Act was ultra vires Article 8 of the Constitution, and therefor it, and anything done thereunder, was null and void and of no effect.

Wambuzi, J., who dissented from the judgment of J.Jones and Mead, did so substantially on the premise that it was not enough for the petitioner merely to show that a particular law was in conflict with the declaratory section to the bill of rights, but that he must go further to show the actual repugnancy with one or any of the operative sections that follow. In this connection he said:

"Looking at Chapter III [in the bill of rights] generally... it is evident that the fundamental rights and freedoms of the individual named in Article 8 [i.e. the declaratory statement] can be ascertained only by reading the remaining articles in that chapter. No provision in Article 8(2) of the Constitution can be said to have been infringed unless it is shown that a corresponding provision defining and limiting the right or freedom has been infringed".¹⁸

Wambuzi, J., went on to show that the protection of property referred to in Article 8(2)(c) was to be found in Article 13 which dealt with the "protection from deprivation of property". This, he said, "must be the protection or part of the protection referred to in Article 8(2)(c) of the Constitution". It therefore followed that for the petitioner to succeed in his claim that the impugned law deprived him of his sum of money represented in the judgment debt, the conditions laid down under Article 13 (and not Article 8) will have to be satisfied. In Wambuzi's view, however,

"the judgment debt in question which is nothing more than a right to recover the amount of the debt is not such property as is protected under Article 13 of the Constitution. It is not purported under the (impugned) Act to be taken possession of nor is purported to be acquired by the Government. It is purported simply to be extinguished by the legislature. In those circumstances, the question whether the taking possession or acquisition was in the public interest"

as prescribed by Article 13 does not arise.¹⁹ In other words, the judgment of the two other judges which was based on the

assumption that a declaratory section confers legal rights and obligations which can be enforced judicially was obviously wrong. 'Declaratory sections' as they appear in the Commonwealth African bills of rights are in the nature of a preamble to the substantive provisions that follow guaranteeing rights and freedoms; and it has never been doubted that a preamble, at least in the English conception, forms no part of the statute and so cannot create any legal rights or obligations enforceable through the Courts. It therefore follows that (in the case under discussion) Justice Wambuzi's line of thought and assumption that the petitioner, to succeed in his claim, must show that some right in the substantive portions of the bill of rights, and not in its declaratory section, has been infringed was correct.

B) Individual Rights and Freedoms specifically protected

The rights and freedoms which were entrenched under the Zambian Constitution, and indeed under most other Commonwealth African constitutions, were those in the nature of "the traditional natural rights", which, as we have seen, trace their immediate origin from the European Convention - but which in fact have a long history enmeshed in the Western politico-philosophical traditions.²⁰ Like the European Convention, these rights are formulated with a great degree of ^{specificity} as they were meant to be susceptible to judicial enforceability. However, unlike the terms of the Convention, Commonwealth African bills of rights "are more extensive and detailed.....and include precise definitions of the exceptions or modifications which are allowed to qualify them".²¹ But even within the African type of bills of rights, there are, not infrequently, differences between states both in

the substantive provisions themselves and in the content of the exceptions thereto. This obviously, as has been suggested,²¹ was deliberately intended to "take into account" the various local factors, political, economic, social or cultural, of the country concerned.

There are in all twelve rights and freedoms which are protected under the Zambian bill of rights, and these are²² the right to life;²³ the right to personal liberty;²⁴ freedom from slavery and forced labour;²⁵ freedom from inhuman treatment;²⁶ the right to property and freedom from its deprivation;²⁷ the right to privacy or home and other property;²⁸ the right to the protection of the law;²⁹ freedom of conscience which includes freedom of thought and of religion, etc.;³⁰ freedom of expression;³¹ freedom of assembly and association;³² freedom of movement;³³ and freedom from discrimination on the grounds of race, tribe, colour, etc.³⁴

All of these rights are, of course, subject to exceptions which are carefully detailed in the subsections that in all cases immediately follow the substantive provisions guaranteeing the right or freedom concerned. The reason for this is, no doubt, that it is impossible to provide rights in a constitution in absolute terms: this has led a leading English constitutional lawyer to make a cynical remark which has been widely quoted:

"The ideal constitution.....would contain few or no declarations of rights, though the ideal system of law would define and guarantee many rights. Rights cannot be declared in a constitution except in absolute and unqualified terms, unless indeed they are so qualified as to be meaningless".³⁵

Unlike the position under the European Convention, the exceptions to the rights and freedoms under the African bills of rights are so complex in detail and comparatively vast in range, that one commentator described the earliest of these bills to be devised (i.e. the Nigerian bill) as "a Bill of exceptions, not a Bill of Rights".³⁶ The freedom of movement under the Zambian Constitution, for example, has only five sentences guaranteeing the freedom, but is followed by more than thirty-seven sentences specifying grounds on which that freedom can lawfully be derogated from.³⁷ The position is even worse with regard to freedom from deprivation of property after 1969, when a Constitution amendment was passed specifically to remove the restrictive provisions on the acquisition of property which the independence constitution had imposed on the government.³⁸ In its amended form there are only seven sentences guaranteeing the freedom, but these are followed by no less than one-hundred-and-five sentences defining situations in which the compulsory acquisition of property can lawfully be effected.³⁹

The fact, however, is that all of the rights and freedoms under the Zambian Constitution are qualified: thus even the more direct 'God-given' right, that is the right to life, is subject to a number of exceptions. The right to life, for example, is not infringed if life is deprived in execution of the sentence of a court for a criminal offence of which the person concerned has been convicted. The right is also not infringed if death results from a lawful act of war or from a lawful use

of such force as is reasonably justifiable for the defence of person, and even more interesting, for the defence of property, or to effect an arrest, or for suppressing riot, insurrection or mutiny. With regard to an equally important right of an individual, the right to personal liberty, there are ten specified classes of case in which its deprivation is authorized by law.⁴⁰ Most of these cases are naturally intended to enable the State to maintain law and order and therefore achieve national security. The right to personal liberty is also made to operate subject to the constitutional provisions relating to detention, or restrictions of persons during an emergency.⁴¹

The provisions to secure non-discrimination on the grounds of race, tribe, place of origin, political opinions were especially important to Zambia with its experience of a long history of racial antagonism between Africans and Whites, especially during the federal period.⁴² Because of its economic potential and job opportunities, especially in its mining industry, Zambia attracted a considerable number of whites and people of Asian origin, who constituted racial minorities. Zambia too, like many other Commonwealth African states, had many small groupings of ethnic communities (about seventy) which were surrounded by the three dominant tribal groups of Bemba, Lozi and Ngoni. The nationalist government which took over from the colonial regime was dominated by people from those three main tribes. At independence, too, and thereafter before the advent of the one-party state, Zambia was a typical multi-party state whose opposition parties were active.

Therefore, Zambia, presented an ideal situation where discrimination against racial and tribal minorities and against those who belonged to opposition parties, who held different views about how the government should be run, could be an established feature of post-independence political practice. However, in recognition of the existence of large segments of tribal communities in Zambia, the provision protecting against discrimination does not apply to any law which makes provision "for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable to the case of other persons".⁴³ Also it was in recognition of the peculiar circumstances of Northern Rhodesia, as Zambia was then known, in the area of race relations between Africans and Whites during the Federation that the Constitutional Council was instituted in the self-government Constitution of 1963 with the purpose of examining any new Bills passed by the Legislative Assembly before submission for the Governor's assent, and for the Council to recommend whether, in its opinion, the Bill was unfairly discriminatory or otherwise contravened the provisions of the 'Declaration of Rights'.⁴⁴ This Council was replaced by the establishment of a Special Tribunal in the Independence Constitution,⁴⁵ which inherited most of the functions performed by the Council. The Special Tribunal has also survived the establishment of the One-Party Constitution.⁴⁶ The National Commission on the Establishment of a One-Party Participatory Democracy in Zambia noted that protection from discrimination on

the grounds of sex was not covered in any of the relevant sections of the Independence Constitution.⁴⁷ It therefore recommended, and government accepted,³⁸ that protection from discrimination on the grounds of sex should also be included in all relevant sections of the proposed One-Party Constitution. In the first instance, the Independence Constitution did have a stipulation in the 'declaratory section' prohibiting discrimination, *inter alia*, on grounds of sex: but as noted earlier, this method of protecting a right is not enforceable in law.⁴⁹ What the Commission inevitably wanted to see was the actual incorporation of the freedom from discrimination on grounds of sex in the appropriate substantive provision in the Constitution dealing with freedom from discrimination. However, when the One-Party Constitution was finally enacted, the promised inclusion of a stipulation to that effect was never, in fact, implemented.⁵⁰ Again, only in the declaratory section of the One-Party Constitution does the stipulation occur.

It seems that the provisions to secure the 'due process of law' under Section 20 of the Constitution are the least qualified and are in most parts prohibitive against infractions of the various rights guaranteed to the accused persons. However, the right to counsel of one's choice before any court received some narrow interpretation by the High Court of Zambia. The relevant constitutional provision protecting this right is worded as follows:

"Every person who is charged with a criminal offence.... shall be permitted to defend himself before the Court in person or, at his own expense, by a legal representative of his own choice".⁵¹

The Court, in Patel v. Attorney-General for Zambia,⁵² ruled that the words "legal representative" here means a "legal representative, entitled to practice in Zambia as an advocate", and "must be a person who is not disabled under any law in Zambia from appearing before the Court and actually exercising his right of audience". The Court in effect was saying that an accused person cannot argue that his right to a legal representative of his choice has been infringed if the particular lawyer he engaged, though entitled to appear before the court, is disabled by law from entering Zambia and whose presence in the country would constitute a criminal offence.⁵³ This statement was made by way of obiter dictum in this case. But in the Nigerian case of Awolowo v. Federal Minister, Internal Affairs,⁵⁴ the Nigerian Federal Supreme Court made it clear that the right of an accused person to counsel of his own choice which the Constitution provided for, may be curtailed for various reasons: for example, the counsel of a person's choice may be under lawful detention, or he may have been legally prohibited to enter into the country if he is a foreigner, and so forth.

As already indicated, there is no doubt that the provisions giving protection from deprivation of private property in Zambia form "lengthy and complex" clauses. The strong base in Zambia's expanding business interests as represented by the mining industries, and in other sectors of the economy, required to promote the entrenchment of these interests by constitutional means - the intention being to make it difficult for the reformist nationalist administrators to tamper with those interests and with private property generally. The protection of property rights and the

needs of economic development in an emergent state like Zambia, is fully dealt with in another chapter of this work, but suffice it to make the point here that the Independence Constitution prohibited the compulsory acquisition of property of any description, or indeed any interest therein, except when certain specified conditions have been fulfilled; that is to say

- "(a) the taking of possession or acquisition is necessary or expedient -
 - i) in the interests of defence, public safety, public order, public morality, public health, town and country planning: or
 - ii) in order to secure the development or utilization of that, or other property, for a purpose beneficial to the community; and
- (b) provision is made by a law applicable to that taking or acquisition -
 - i) for the prompt payment of adequate compensation; and
 - ii) securing to any person having an interest in or right over the property a right of access to a court or other authority for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation".⁵⁵

In Kenya, Swaziland and Lesotho, the requirement of "prompt and adequate compensation" was/is even stricter, in that those constitutions use the expression "prompt payment of full compensation".⁵⁶

The phrase "prompt and adequate compensation" in the Zambian constitution, together with other conditions necessary for a lawful acquisition of property, were removed from the constitution by a constitutional amendment in 1969.⁵⁷ By this change in the constitution, the government sought to embark on the policy of

taking over foreign-owned businesses or at least to acquire some shares in the mining, industrial and financial businesses of the country. The amendment also empowered the government to acquire compulsorily any property "under the authority of an Act of Parliament which provides for payment of compensation for the property or interest or right to be taken possession of or acquired".⁵⁸

C) Derogations from the guaranteed Rights and Freedoms during normal times

It has been noted in the preceding paragraphs that rights and freedoms cannot be constitutionally guaranteed in absolute terms because "the entrenchment of human rights in the constitution is merely an attempt to strike a more or less permanent balance between the interests of the individual and those of the State".⁵⁹ As the 'declaratory section' to the bills of rights asserts, the enjoyment of these rights by one single individual or a group of individuals should take into account the rights and freedoms of others and of the public interest as a whole⁶⁰ - thus, the need and justification for the exceptions to the rights guaranteed. Going through the specific articles in the constitution, and particularly noting the exceptions thereto, it is to be noticed that these exceptions fall broadly into two classes. The first class of exceptions are those which do not confer authority on the legislature to derogate from the guaranteed rights in the interests of defence, public safety, public order, public morality and public health. The exceptions belonging to this category are of a hybrid kind in that they are not underlined by any identifiable common principle upon which the exceptions are based, but instead each provision

guaranteeing the rights also defines its own appropriate exceptions to it. Thus the rights to life, personal liberty, freedom from inhuman treatment, slavery and forced labour, freedom from discrimination, and the right to the protection of law, contain exceptions of this category. In Nigeria (1960), even the right to adequate compensation for property acquired compulsorily was not subject to laws passed in the interest of defence, public order, etc.⁶¹ With the exception of freedom from discrimination, and, in the case of Nigeria, with the right to property, the rights subject to these kind of exceptions are concerned primarily with the interest of the individual, and rarely draw the Courts into the controversial arena of balancing between the interest of an individual against that of the community as a whole. The Court would find a determination of the alleged infraction of any of these rights to be relatively safe than with those rights loaded with policy considerations.⁶²

The second class of exceptions is that whose main purpose is to empower the legislature to carry out measures to promote the public good by even retracting from the prohibitions contained in the guaranteed rights concerned. Thus the right to privacy of home and other property, freedom from deprivation of property, of conscience, of expression, of assembly and association, and of movement, under the Zambian Constitution, are guaranteed subject to curtailment by laws that are "reasonably justifiable in a democratic society" in the interest of defence, public order, etc. In other words, the exceptions to this class of rights authorize the government to encroach upon the rights guaranteed to

individuals in the name of some specified interests, but that this encroachment must be shown to be reasonably justifiable in a democratic society. Grove has neatly summarized what this demands of the approach of the Courts when they are engaged in the interpretation of these sets of rights; he has written that:

"This phrase [i.e. 'reasonably justifiable in a democratic state] brings the courts into the picture, for it is they who must balance the rights of the individual against the interests of the community in order to determine if the restriction is 'reasonably justifiable'. Clearly cases in this.....category.....involve the courts in questions of.....policy. A court must consider the nature of the individual and community interests which are involved. It must examine the degree to which the individual's interests undermine those of the community interests which are involved...."63

Quite obviously the extent to which the constitutional guarantee of these rights limits the exercise of governmental authority turns on the meaning which the Courts have given to the concept of "reasonably justifiable in a democratic society". Quite happily the Zambian Courts have now exhaustively dealt with this question, and this, with the Nigerian experience in the background, has set the standard upon which the limitation of governmental actions inherent in the expression under reference can go. First it may be asked how judges have responded to the requirement that the restrictions to the guaranteed rights must be "reasonably justifiable in a democratic society".

D) "Reasonably justifiable in a democratic society"

The first fundamental rights case which involved the Zambian Courts in the interpretation of the meaning of the expression "reasonably justifiable in a democratic society" was Feliya Kachasu v. The Attorney-General for Zambia.⁶⁴ This case is discussed in detail in a subsequent chapter, and therefore only its relevance

to the present discussion will be mentioned here. The constitutional provision alleged to have been infringed was Section 21, which deals specifically with the protection of the freedom of conscience. This freedom is one of those which belong to the second category that we have mentioned above, in that the provision introducing the right to freedom of conscience, thought and religion is followed by provisoes allowing the government to impose restraints by law which satisfies certain requirements, and when those restraints themselves are reasonably justifiable in a democratic society. The applicant had been suspended from school and refused reinstatement because, being a Watchtower Jehovah's Witness, she refused to sing the national anthem and to salute the national flag, as required by Ministerial regulations. She also indicated that she would not participate in any of these ceremonies, which she regarded as being contrary to her religious beliefs. The school headmaster suspended her and excluded her from school, pursuant to the Education (Primary and Secondary Schools) Regulations, 1966, which required all pupils formally to sing the national anthem and to salute the national flag on certain occasions. These regulations also empowered the headmaster to suspend any pupil who refused to do any of these things, as had happened in the applicant's case.⁶⁵ She now claimed that the regulations under which she was suspended were invalid because they were in conflict with Section 21 of the Constitution guaranteeing the freedom of conscience, thought and religion. Moreover, she claimed that her being suspended under them constituted a hindrance in the enjoyment of her freedom of conscience, thought and religion within the

meaning of the constitutional provisions. In terms of the Constitution, therefore, for the applicant to succeed in her claim that her freedom of conscience, thought and religion was interfered with by the law under attack, she had to establish the following points, viz.,

- i) that the action taken by her school authorities in coercing her to sing the national anthem and to salute the national flag contrary to her religious expression, amounted to a hindrance in the enjoyment of her freedom of religion within the meaning of the Constitution;
- ii) secondly, that this hindrance and the law under which it came to be exercised went beyond the extent of what was reasonably required in the interests of defence, public safety or public order; and
- iii) finally that the law authorizing the challenged actions itself went further than was reasonably justifiable in a democratic society.

The applicant easily succeeded - proving "hindrance", thus disposing of requirement (i), as above. With respect to requirement (ii), the Court, holding that the burden had been successfully disposed, ruled that,

"Bearing in mind the compelling consideration, particularly at the present time, of national unity and national security, without which there can be no certainty of public safety nor guarantee of individual rights and freedoms, I think it is a reasonable requirement that pupils in.....schools should sing the national anthem and salute the national flag".⁶⁶

In other words, the Court was saying that the law under which the applicant came to be suspended, and which was under attack as being unconstitutional, was reasonably required in one of the interests

specified by the Constitution, namely, the interest of national safety or security. The crucial question, however, was whether that law was further reasonably justifiable in a democratic society. On this Blagden, C.J., ruled that

"The criteria of what is justifiable in a democratic society might vary according to whether that society is long-established or newly-emergent. Zambia is a newly-emergent state. It would be unrealistic to apply this criterion of a long-established democratic society. We should look to the democratic society that exists in Zambia; and having found that these regulations are reasonably required in Zambia I have no hesitation in finding that they are reasonably justifiable in the democratic society that exists here".⁶⁷

This interpretation of "reasonably justifiable....." and of its equation to "reasonably required" would have the support of De Smith, who remarked that "one can imagine unjustifiable action being taken in pursuance of a reasonably required law, but it is very hard to see how a law can itself be both reasonably required and not reasonably justifiable".⁶⁸ The difference between De Smith's view and that of Chief Justice Blagden is that the former was referring to "reasonably required" and "reasonably justifiable" and their logical relationship, while the latter was referring to "reasonably required" and "reasonably justifiable" in a democratic society". The difference between these sets of phrases is self-evident. The proposition upon which Blagden based the interpretation of "reasonably justifiable in a democratic society" in the Kachasu case was, however, not followed, but was indeed rejected in the later Zambian case of Jasbhai Patel v. The Attorney-General (popularly known as the Patel Currency Case).⁶⁹ In this case, which was also a fundamental rights case, it was argued by one of the counsel that "if what is reasonably

required in Zambia is to be equated with what is reasonably justifiable in a democratic society, the latter part of the subsection would be tautologous and completely unnecessary". In other words, if the Court could decide that the regulation, or what was done under it, was reasonably required in any of the specified interests, there would be nothing more for it to decide on the issue of whether it was reasonably justifiable.

Magnus, J., who decided the case, thought that "it is necessary to adopt the objective test of what is reasonably justifiable, not in a particular democratic society, but in any democratic society". He, however, conceded to the argument that "some distinction should be made between a developed society and one which is still developing, but I think one must be able to say that there are certain minima which must be found in any society, developed or otherwise, below which it cannot go and still be entitled to be considered as a democratic society".⁷⁰

A further observation by Justice Magnus in the same case about the difference between "reasonably required" and "reasonably justifiable in a democratic society" is of some interest. His Lordship asserted that a regulation authorizing some public officer to do something can be reasonably required in any of the specified public interests, but for the purposes of determining whether it, or anything done under it, is reasonably justifiable, the method used in implementing or attaining the specified object authorized by law is of fundamental importance. Thus, even though an exchange control regulation can be found to be reasonably required for the purpose of guarding against exchange control evasions, "method is fundamental when one comes to consider....." whether

the same regulation is reasonably justifiable: for "here it is the manner in which the power.....was exercisable and in fact exercised which is the question". What the Court was saying, in other words, is that if parliament were to introduce a measure, which, say, gave the police or any other official, carte blanche powers of search at their own discretion, that such a measure would certainly not be reasonably justifiable in a democratic society.

The judicial interpretation of "reasonably justifiable in a democratic society" in the Nigerian bill of rights also received some judicial interpretation by the Federal Supreme Court and many learned commentaries have evolved about the trend of these decisions.⁷¹

E) Enforcement of the Protective Provisions

Unlike the American Bill of Rights, all the "Neo-Nigerian" bills of rights in Commonwealth Africa include an expressly entrenched provision for the enforcement of the rights guaranteed. Under the Zambian Constitution, for example, any person alleging that a fundamental right has been, is being or is likely to be contravened "in relation to him" may apply to the High Court for redress. The Court is then under a duty⁷² to hear and determine the justiciable issues involved, and in consequence, may make such orders, issue such writs and give such directions as it may consider appropriate.⁷³ However, there is no express or specific mention of the orders and writs which the Court may issue in the Zambian provision - and this is indeed the case under the rest of

Commonwealth African constitutions, except under the now overthrown constitution of Ghana, 1969. Under the 1969 Ghana Constitution it was specifically provided that the orders and writs which the Court may issue in connection with the enforcement of the rights and freedoms guaranteed therein include "writs and orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto".⁷⁴ Although the constitutional provisions make no reference to specific remedies in Zambia and the other countries, the Courts have in fact been using those very old remedies specified in the Ghanaian constitution - especially habeas corpus, certiorari, mandamus, and the newer remedy of a 'declaratory judgment'.

Still on the enforcement provisions, the Zambian Constitution, together with the rest of African constitutions, provides further that if in any proceedings in a subordinate court any question arises as to the convention of the protective provisions, the person presiding in that court is under a duty to refer the question to the High Court if one of the parties to the proceedings so requests, unless he is of the opinion that the raising of the question is merely frivolous or vexatious.⁷⁵ If the constitutional point arises in this way, the Zambian Courts have insisted that the Magistrate in the subordinate court handling the matter "should have the issues framed by the parties and refer such issues to the High Court", and that "it is not correct for the magistrate simply to adjourn the proceedings and direct that one of the parties should apply to the High Court pursuant to Section 28(1) of the

Constitution".⁷⁶ There have been at least two instances when, by this procedure, fundamental rights disputes found their way to the High Court for Zambia.⁷⁷

In Uganda (1966), Jamaica (1962), Malawi (1964), and Sierra Leone (1961) there is a proviso in these sections conferring a special jurisdiction on the Courts for the enforcement of the guaranteed rights, to the effect that

".....the High Court (or Supreme Court) shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any law".⁷⁸

No such proviso exists in the constitutions of Zambia and Kenya. Further, in Zambia (but not in Kenya) it is expressly provided that no appeal can be from the determination of the High Court dismissing on application on the ground that it is frivolous or vexatious.⁷⁹

In all of the African Commonwealth constitutions the practice and procedure to be followed in the determination of the fundamental rights cases arising under this special jurisdiction, is to be prescribed "by the persons or authorities.....having power to make rules of court with respect to practice and procedure...." (In Kenya the Chief Justice is specifically mentioned as the authority to prescribe such matters.) In their absence the Zambian High Court, in the first two post-independence fundamental rights cases, adopted the general High Court Rules which apply to most civil suits, and prescribed that

"any application.....made to the Court in respect of which no special procedure has been provided by any law..... [shall] be commenced by an originating motion".⁸⁰

But since the Patel Currency Case was decided, the Protection of Fundamental Rights Rules, 1969, have been made: these now provide that an application under Section 28 of the Constitution (that is under the enforcement provision) should be made by petition to the High Court.⁸¹ In the Somabhai Patel Case,⁸² the High Court for Zambia ruled that a reference of a constitutional issue by the subordinate court to the High Court, as discussed above, "is not an application to 'that Court' and the Protection of Fundamental Rights Rules do not apply to such reference and do not in any way inhibit the Magistrate from adopting the procedure"⁸³ specified under Section 28(3) of the Constitution.

However, the Courts in Commonwealth African jurisdictions have refused to allow procedural technicalities to impede the exercise of their jurisdiction to entertain disputes, touching on the fundamental freedoms of individuals. Thus in the Nigerian case of Cheranci v. Cheranci,⁸⁴ Bate, J., commented that

".....The Constitution Order gives no guidance as to procedure and no law such as is envisaged by Section 245(4) has as yet been passed to regulate procedure. No objection has, however, been taken to the procedure adopted by the applicant and since the liberty of the subject is involved, I would not myself think it proper to raise a procedural objection".

Before the High Court of Zambia, the state in a fundamental rights case tried to argue that an application for redress under the Special Jurisdiction of the Court to hear and determine allegations for breach of the protective provisions cannot simultaneously be

used to impugn a law or administrative act alleged to violate other provisions of the Constitution. It was submitted that accepting that the petitioner's application is an application to the Court for redress under the special jurisdiction, conferred upon by Section 28 of the Constitution, then the Court is strictly limited to the jurisdiction so conferred. Section 28 specifically preserves the subject's right to pursue other remedies lawfully available to him. It was therefore argued that the Court had no jurisdiction under Section 28 of the Constitution to make any order where the complaint was simply that a regulation was invalid or something done under it was unlawful because of a conflict, not with the protective provisions, but with the provisions of some Act. While agreeing with this view, the Court nevertheless overruled it because as the Court put it:

".....for the purposes of exercising the Special Jurisdiction it may, and in most cases it will, be necessary to determine the validity, effect and application of legislation, where the complaint is, as here, that a breach of the protective provisions has been brought about in part by that legislation or anything done under it".⁸⁵

- i) Requirement of the Standing of the Plaintiff in the Case
Under the Zambian Constitution in line with the rest of the African Commonwealth constitutions, access to the Courts is guaranteed to anyone who alleges that any of the constitutionally guaranteed rights "has been, is being or is likely to be contravened in relation to him".⁸⁶ This is the phraseology the judicial interpretation of which has evolved the principle in Commonwealth Africa (otherwise established in the US and India) that

"the party who invokes the power must be able to show not only that the statute is invalid, but that he has sustained, or is immediately in danger of sustaining, some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally".⁸⁷

The Indian Supreme Court has also pronounced that only a person whose rights have been affected by a statute may challenge its constitutional validity, and that that person's rights must be directly or immediately threatened.⁸⁸

In its African Commonwealth form the principle was firstly enunciated in the Nigerian case of Olawayin v. Attorney-General of Northern Region.⁸⁹ In this case the applicant brought proceedings in the Federal Supreme Court of Nigeria challenging the validity of the Children's and Young Persons' Law, 1958, of the Northern Region. This law prohibited political activities by juveniles, as well as the inducing of such activities by adults. The applicant had not induced any juveniles to engage in political activities and therefore no direct threat of prosecution of him under this law could ever be contemplated. Nevertheless, the applicant attacked the law as infringing the guarantee of private and family life, freedom of conscience, and freedom of expression in the Constitution of Nigeria (1954). He rested his case on the ground that he was a father of children whom he wished to instruct politically, but was unable to do so for fear of violating the Statute. The High Court dismissed the case because

".....no right of the applicant was alleged to have been infringed and that it would be contrary to principle to make a Declaration in vacuo".⁹⁰

On appeal to the Supreme Court the applicant tried to argue that the enactment of legislation which makes an offence of something which a person is constitutionally entitled to do is sufficient to make him an interested party, to seek a declaration from the Court. The Supreme Court then considered the Standing of the applicant to contest the validity of the Children's and Young Persons' Law: Unsworth, F.J., speaking for the Court, remarked that:

"The appellant did not in his claim allege any interest but his counsel said that the evidence would be that the appellant had children whom he wished to educate politically. There was no suggestion that the appellant was in imminent danger of coming into conflict with the law or that there had been any real or direct interference with his normal business or other activities. In my view the appellant failed to show that he had a sufficient interest to sustain a claim. It seems to me that to hold that there was an interest here would amount to saying that a private individual obtains an interest by the mere enactment of a law with which he may in future come in conflict; and I would not support such a proposition".⁹¹

The Nigerian decision did not, however, define what actions of the applicant would have amounted to his obtaining a locus standi in the circumstances. For example, the applicant might have fallen foul of the law in question if, in the course of his activity as a politician he addressed a political assembly of juveniles, or solicited their membership of a political party or associated with them politically.⁹²

In the Zambian case of Harry Nkumbula v. the Attorney-General for Zambia,⁹³ the concept of locus standi, as expressed through the constitutional phraseology "has been, is being or is likely to be contravened in relation to him [i.e., the applicant]" received a detailed consideration by the Court of

of Appeal. The President of the Court of Appeal for Zambia, Baron, J., ruled on behalf of the Court:

"This Section [S.28(1)] applies only to executive and administrative action (or exceptionally, action by a private individual) and that this is so is underlined by the existence of the words "in relation to him". Thus, if there is on the Statute book an Act of Parliament, or subsidiary legislation, which it is alleged contravenes the Constitution, it is not open to any individual to come to court and ask for a declaration to this effect; before the individual has locus standi to seek redress there must be an actual or threatened action in relation to him. For instance, if an individual is arrested under a provision of an Act which he alleges is ultra vires the Constitution, he may in addition to any other remedy open to him proceed under Section 28(1). Again, if the individual has good ground for believing that some executive or administrative officer will take some action prejudicial to him and in contravention of his rights under Chapter III of the Constitution, he may proceed under this section. Many examples might be given.

"For instance, a parent of a schoolchild might have received a letter from the headmaster threatening expulsion if the child did not conform to certain rules; the parent need not wait for the actual expulsion but could invoke Section 28(1) if he alleges that to enforce such rules would contravene the provisions of Chapter III. Again, a trader might have received an intimation from an executive officer indicating that a recommendation would be made for the revocation of his trading licence if certain conditions were not complied with; the trader would have locus standi to proceed under Section 28(1) to determine whether the imposition of such conditions and the revocation of a licence or failure to comply therewith could be in contravention of his constitutional rights".⁹⁴

Finally, under the Constitution of Zambia no application can be made under Section 28(1) in respect of a Bill alleging that it would, if enacted into law, infringe any of the guaranteed rights: Section 28(5) provides for this situation as follows:

"No application shall be brought under Subsection (1) of this section i.e. S.28 on the grounds that the provisions of Sections 13 to 26 (inclusive) of this Constitution are likely to be contravened by reason of proposals contained in any bill which, as the date of the application, has not become law".

Thus, in the Nkumbula case, since what the applicant was contending for was that the government's plan to introduce legislation in future bringing about a "one-party participatory democracy" will infringe his rights under the Constitution in its present form", the Court quickly replied that:

"the existence of Section 28(5) makes it clear that if the only step taken by the executive is the introduction of the bill in question, subsection (1) cannot be invoked...."

What is striking about Section 28(5), cited above, of the Zambian Constitution is that no similar provision under the 'enforcement of protective provisions' is to be found in any of the other Commonwealth African constitutions.⁹⁵ The reason for this is that in Zambia, and nowhere else in the African states, the Constitution specifically provides the machinery for testing whether or not a particular Bill is incompatible with a bill of rights, prior to its becoming law. This machinery is in the nature of a special tribunal appointed by the Chief Justice. This procedure has its roots in the constitutional history of Zambia. It is appropriate to discuss this unique feature of the Zambian Constitution in detail.

ii) The role of a Special Tribunal under Section 27 of the Constitution

The Special Tribunal established under Section 27 of the Republican Constitution and continued under the One-Party

Constitution traces its origins to the Constitutional Council, which was itself established in the Self-Government Constitution of 1963 as recommended by the Monckton Commission.⁹⁶ The Northern Rhodesia Independence Conference, 1964, which settled the form of the independence constitution, agreed that "the Constitutional Council established by the present constitution [i.e. the Self-Government Constitution, 1963] would not be reproduced in the "independence constitution. But a section would be included in the chapter of the independence constitution dealing with human rights....immediately before the section corresponding to Section 15 of the present constitution [i.e. the enforcement of protective provisions], containing provisions..."⁹⁷ to replace the Constitutional Council with a Special Tribunal. Thus this is why the provisions relating to the Special Tribunal, that is Section 27, immediately precedes the provisions relating to the enforcement of the rights and freedoms under Section 28.

The Tribunal thus established differs from the former Council in composition and procedure only, but inherits the same basic functions as its predecessor. Further, the legislature was now brought into the process in that its jurisdiction can be invoked at the request of a number of Members of Parliament; this was not the case with regard to the Constitutional Council.⁹⁸

The Constitution (1964) provided that if not less than seven members of the National Assembly gave written notice to the Speaker within three days after the final reading of any bill by the Assembly, the Speaker would inform the Chief Justice, who would appoint a tribunal consisting of two persons, each of whom would be either a serving judge or have held the office of a judge of the High Court. The tribunal would then consider whether the bill, if enacted, would be inconsistent with the code of fundamental rights included in the independence constitution and make a report on the matter to the President and the Speaker. The tribunal could refuse to consider the matter if in its opinion the grounds put forward for consideration of the bill were merely frivolous or vexatious.⁹⁹ The Constitution is silent on the effect of the report of the tribunal that the bill appears to be inconsistent with the Bill of Rights. It is clear that in these circumstances the President may choose either to assent to the bill nevertheless, or to refuse his assent and to return the bill to the Assembly. In this latter case it seems that the procedure under Section 71(4)(5)(6) would apply. This is to the effect that when the President returns a bill to the National Assembly, that bill should not again be presented to the President for assent unless within six months it received the support of a two-thirds majority of all members of the Assembly.

Where this occurs the President should either dissolve parliament or give his assent within twenty-one days of the presentation of the bill. The effect of dissolving parliament under the Republican Constitution is that the President is also required to stand for election.¹⁰⁰

A procedure similar to the one described above applied in relation to statutory instruments which were required to be published in the gazettes within fourteen days of their being made. If the tribunal reported that the statutory instrument in question appeared to be inconsistent with the bill of rights, the President could make an order either affirming it or annulling it.¹⁰¹ The tribunal was also empowered to perform the functions which the Constitutional Council performed in respect of granting legal aid, at the public expense, to anyone who "intends to bring or is an applicant or appellant..." in proceedings in which the issue is an allegation for the infringement of any of the guaranteed rights in relation to him, but who cannot afford to pay for the cost of the application.¹⁰² The Independence Constitution re-enacted this to read that "Whenever.... the Chief Justice considers it necessary for the purpose under Section 28 of this constitution",¹⁰³ he could appoint the tribunal for this purpose; the tribunal may then grant such aid to any person who satisfies it that

- " a) he intends to bring or is an applicant in proceedings under Section 28(1) or 28(4) of this constitution;
- b) he has reasonable grounds for bringing the application; and
- c) he cannot afford to pay for the cost of the application".¹⁰⁴

All these provisions relating to the establishment and functions of the Special Tribunal were reproduced in the One-Party Constitution of 1973.¹⁰⁵ However, by a Constitutional Amendment,¹⁰⁶ a request for a report on a bill or a statutory instrument now requires the support of twenty-one members of the National Assembly, not, as before, seven.

F) Derogations from Fundamental Rights During an Emergency

All African states which became independent from Britain had provisions in their independence constitutions designed to preserve the safety of the new nation from either an actual public emergency or from some threatened danger which might befall the nation.¹⁰⁷ It is recognized, even among the older-established nations with less likelihood of being confronted with some serious national disaster, that the principle of salus populi est supreme lex (that is to say, that the safety of the nation is the supreme law) is of cardinal importance. If this is so with respect to old nations, how much concern does it generate to new nations which, as President Nyerere reckons, "have neither the long tradition of nationhood, nor the strong physical means of national security, which older countries take for granted".¹⁰⁸ This need to safeguard the rights and freedoms of individuals in the constitution has to be

reconciled and balanced with the overriding need to preserve the state. The Attorney-General of Zambia, making submissions to the Court in one of the human rights cases, gave an impressive summary of the extent to which the security of the state can impinge on the protection of individual rights:

"....the applicant's undoubted right to enjoy freedom of conscience, and all the other rights and freedoms guaranteed by Chapter III of the Constitution, depend for their very existence and implementation upon the continuance of the organized political society - that is the ordered society - established by the Constitution. The continuance of that society itself depends upon national security, for without security any society is in danger of collapse or overthrow. National security is thus paramount not only in the interest of that State but also in the interests of each individual member of the State; and measures designed to achieve and maintain that security must come first; and.....must override, if need be, the interests of individuals and of minorities with which they conflict...."¹⁰⁹

Here we shall concern ourselves with an examination of the extent of security or emergency powers, both constitutional and statutory, conceded to the nationalist government at independence, and how this impinges on human rights. The question of how far these have been used in Zambia will be discussed in a subsequent chapter dealing with the protection of personal liberty.

i) Emergency laws in Zambia

Before 1964, that is before independence, there were three pieces of legislation in Northern Rhodesia to deal with full or partial emergency situations;¹¹⁰ these were the Emergency Powers Order in Council 1939-61 (which also applied to all British dependencies in Africa and Asia); The Emergency ordinance, 1948; and

finally, the Preservation of Public Security Ordinance, 1960. Unlike some independent African states, where it was customary to continue the Emergency Powers Order in Council 1931, for some time after independence (Ghana for example), in Zambia the independence constitutional conference, 1964, agreed that at the independence date the Emergency Powers Orders in Council would expire,¹¹¹ and in consequence of this the Zambia Independence Order, 1964, accordingly provided for the Order in Council to "cease to have effect as part of the law of Zambia".¹¹² The Emergency Powers Ordinance, 1948, was also discontinued after independence.¹¹³ Both of these colonial laws were replaced by new legislation, the Emergency Powers Act, 1964,¹¹⁴ which came into operation on the eve of Zambia's independence. On the other hand, the Preservation of Public Security Ordinance continued into force after 1964 (renamed the Preservation of Public security Act).¹¹⁵

The independence constitution (and One-Party Constitution) vested the power to proclaim a declaration that

- " a) a state of public emergency exists, or that
- b) a situation exists which, if it is allowed to continue, may lead to a state of public emergency",¹¹⁷

in the President of the Republic. A declaration of situation (a) as above invokes full emergency powers and is governed by the Emergency Powers Act, mentioned

above. A declaration of situation (b) relates to dealing with threatened or semi-emergency situations, and is governed by the Preservation of Public Security Act. The President (like his predecessor, the Governor, under the Colonial Emergency legislation) has the unchallengeable discretion to say whether a situation has arisen to justify a declaration of a semi-emergency or a full emergency, and thereby to bring into operation the wide powers conferred by the Preservation of Public Security Act or the Emergency Powers Act, as the case may be.

The effect of a Presidential declaration of a semi-emergency in accordance to the Constitution is, as indicated above, to bring into operation the far-reaching provisions of the Preservation of Public Security Act. Under this Act, the President is empowered, for the preservation of public security, to make regulations which have far-reaching consequences on individual rights and liberties.¹¹⁸ For example, the President may, by regulation, make provision for the prohibition of the publication and dissemination of any matter which, in his opinion, is prejudicial to public security; make provisions for the prohibition, restriction and control of assemblies; make provision for the restriction, prohibition, and control of residence and movement, and possession, acquisition or use of property. He may also make regulations to provide for the detention of

persons;¹¹⁹ and he may "make provision for, and authorize the doing of, such other things as appear to him to be strictly required by the exigencies of the situation in Zambia".¹²⁰ Further, any regulation made under this Act "shall have effect notwithstanding anything inconsistent therewith contained in any written law other than the Zambia Independence Order, 1964, or the Constitution...."¹²¹

Since the declaration of "threatened emergency" by the Governor of Northern Rhodesia prior to the 24th October 1964 (i.e. before independence), thereby bringing into effect the provisions of the Preservation of Public Security Ordinance, there have been a total of nine statutory instruments¹²² made under this statute to regulate various aspects of public security.

A declaration by the President that "a State of Emergency exists" pursuant to the constitutional provisions already noted immediately applies the Emergency Powers Act to deal with the situation so created by the emergency. The distinguishing mark between the "state of emergency" pure, and "semi-emergency" is that the former is supposed to be a more serious state of affairs than the latter and therefore would require greater powers for the executive to deal with the calamity that has beset the nation. But upon a critical appraisal of the powers that accrue to the Executive both under the Preservation

of Public Security Act, and under the Emergency Powers Act, there is in fact little difference in the range of such powers under these Acts respectively.

However, having brought the Emergency Power Act into effect, the President is empowered thereunder to make such regulations as appear to him to be necessary or expedient for securing the public safety, the defence of the Republic, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community.¹²³ In particular, as in the case of the Preservation of Public Security Act, the Emergency Powers Act empowers the President to make regulations to effect the detention of persons or the restriction of their movements, and for the deportation and exclusion from the Republic of persons who are not citizens of Zambia,¹²⁴ and for the authorization of the taking of possession or control of any property - including its acquisition on behalf of the Republic.¹²⁵ Such regulations can also authorize the entering and search of any premises.¹²⁶ However, the trial of persons by military courts is expressly excluded from the rule-making power conferred on the President;¹²⁷ but he can make regulations to "provide for amending any enactment, for suspending the operation of any enactment, and for applying any enactment with or without modification".¹²⁸ This means that even the penal code or the Criminal Procedure Code

could in effect be suspended or its applications could be varied, and not least, to induce a particular desired political end. Further, while the regulations made under the Preservation of Public Security Act may not be inconsistent with the Constitution, though with other written laws, the regulations made under the Emergency Powers Act may, apparently, be repugnant even to the Constitutional provisions as there is no stipulation to the contrary in the appropriate provisions.¹²⁹

ii) Effect of an emergency situation on the Bill of Rights

The Constitution of Zambia expressly provides for derogation from a certain category of fundamental rights during an emergency. It is worthwhile to reproduce the relevant provision here, it reads as follows:

"S.26 Nothing shall be held to be inconsistent with or in contravention of Articles 15, 18, 19, 21, 22, 23, 24, or 25 to the extent that it is shown that the law in question authorizes the taking, during any period when the Republic is at war or when a declaration under Article 30 (i.e. declaration relating to emergencies or threatened emergencies is in force, of measures for the purpose of dealing with any situation existing or arising during that period; and nothing done by any person under the authority of any such law shall be held to be in contravention of any of the said provisions unless it is shown that the measures taken exceeded anything which, having due regard to the circumstances prevailing at the time, could reasonably have been thought to be required for the purpose of dealing with the situation in question".

The constitutional provisions referred to in the above quotation relate to those which protect, respectively, the right to personal liberty, freedom from deprivation

of property, right to privacy of home and other property, freedom of conscience, freedom of expression, freedom of assembly and association, freedom of movement, and freedom from discrimination. These rights and freedoms are then guaranteed subject at all times to emergency measures including those taken during the semi-emergency period. This, in effect, means that the regulations made under the Emergency Powers Act or the Preservation of Public Security Act, or anything done under their authority, operates to restrict those rights and freedoms mentioned above.

On the other hand, not all rights under the bill of rights are made subject to measures taken during an emergency: the ones missing from the above quotation are those protected under Articles 14, 16, 17 and 20. These relate, respectively, to those provisions securing the right to life, freedom from slavery and forced labour, freedom from inhuman treatment, and the right to the protection of law. These cannot be derogated from at any time.

The question of how much of emergency or security law has been used in Zambia since independence and how the Courts have responded to control some executive actions based on that law's authority will be the subject of discussion in the next chapter.

G) Entrenchment of the Procedure to alter the Bill of Rights

As Ezejiofar has correctly asserted, "constitutional Bills of Rights do not mean very much if they can be destroyed by simple constitutional amendment".¹³⁰ True, if the rights and freedoms which a bill of rights seeks to protect are to be altered in the same simple way as it makes or amends ordinary law, then the whole idea which human rights expresses, namely, to place some limitations on the exercise of political power by the government, loses much of its point and meaning. The idea of creating a bill of rights in a constitution arises out of the need to place certain fundamental matters to society and to citizens beyond the reach of the legislative actions of the government and in this way hope to minimize incidents of arbitrary rule. If no such limitations exist, or if these limitations can easily be removed by the government, then the citizens are clearly exposed to the whims of the rulers, and such a condition is conducive to arbitrary rule.¹³¹ Therefore, the procedure whereby a bill of rights (together with other vital constitutional matters) is altered becomes crucial if the objects for which fundamental rights and freedoms were included in the constitution are to be fully realized. As Professor Anderson has recently said in reference to the United States' Bill of Rights,

"....In America....the Constitution can only be changed by a special procedure which is both difficult and labourious: so all Americans can rest assured that those individual rights included in their Bill of Rights and in subsequent Amendments to the Constitution stand above ordinary laws and cannot be abrogated or attenuated at the whim of a transient majority in a single elective chamber...."¹³²

In the context of the African political realities, the problem of having to subject a bill of rights to be altered by a simple parliamentary majority, of say, two-thirds or even more, is fraught with an obvious danger. For even before the advent of one-party states in most African countries, the nationalist parties which took over from the colonial regime came into power with an overwhelming parliamentary support. Where this was not the case, as in Uganda (1962), the nationalist party in control of government soon manoeuvred itself through to strengthen its position in parliament.¹³³ Hence restrictions based solely on a bare simple parliamentary support had no real significance as a limitation on such governments, since the required majorities could be obtained easily. Professor Nwabueze~~a~~ observes that

"The reality of the African political scene compels the conclusion that constitutionalism would be better safeguarded if the more fundamental provisions of the constitution are made subject to amendment by a procedure involving more than a parliamentary majority, e.g. the participation of some outside body or bodies, like the electorate at a referendum or other legislative assemblies in a federation".

It is precisely because of these predictable problems that the British Government preferred the device of a 'special entrenchment procedure' which involved not only parliament in the amendments of bills of rights and other "fundamental provisions" in the independence constitutions of their African ex-colonies. This procedure varied from country to country "according to the gravity and importance of the provisions in the light of the political circumstances

of the country concerned". From what we have said about the politico-economic issues which characterized the constitution-making in Kenya and Zambia,¹³⁴ the vital significance of the amendment procedure cannot be over-emphasized.

In Zambia the procedure arrived at in amending the constitutional provisions was as follows: for ordinary amendments, publication of the proposed amendment for thirty days in the Government Gazette before the first reading was required, and a two-thirds majority on the second and third readings, were all that was required. But what was to be published in the Gazette was the full text of the bill and not just its title or a summary of it. For an amendment of the specially entrenched provisions an amending Act "shall not come into operation unless the provisions contained in the Act affecting that alteration have.....been submitted to a referendum in which all persons who are registered as voters for the purposes of elections to the National Assembly shall be entitled to vote and unless those provisions have been supported by the votes of a majority of all the persons entitled to vote in the referendum".¹³⁵ The specially entrenched matters to which this procedure applied were the bill of rights, the judicature, the procedure relating to the presentation of bills for presidential assent, the making of statutory instruments, and the amendment procedure itself.¹³⁶

By a constitutional amendment enacted in 1969,¹³⁷ the referendum procedure was abolished and thereafter the only requirement for the alteration of all provisions in the Constitution, including of course a bill of rights, was by a parliamentary majority of three-thirds.¹³⁸ With the introduction of a one-party system in 1973, whereunder every Member of Parliament must be a member of the ruling Party, it became axiomatic that human rights, though retained in the One-Party Constitution, can be amended with ease and, indeed, their very existence precariously depends on the will of the Party which controls Parliament. Mr. John Mwanakatwe, Member of Parliament since Zambia attained independence in 1964 and at the material time Minister of Finance, complained of the ease with which the Constitution was being frequently amended: contributing to a parliamentary debate on one of the occasions when a constitutional amendment was being debated in the one-party National Assembly, he made the following remarks:

"....it is....fair to assert that we have not had a stable constitution of Zambia at all.At the time of our independence we obtained a constitution for Zambia which was, at best, a compromise between the views of the colonial government and those of our leaders who attended the Constitutional Conferences in London in 1964. For this reason, I am the first to admit that the necessity for amending the Constitution was obvious in the early years of our independence. But the point I am making is that the time must come when some caution must be exercised in the urge to amend the Constitution from time to time. I am making this observation because I feel that few people appreciate the sanctity of the Constitution and they think that it should be amended from time to time at the whims of Parliamentarians".

Mr. Mwanakatwe went on to make the important point that,

"On the contrary, the truth is that the extent to which social and political stability can be achieved in the nation depends upon the sense of security citizens can repose in the constitution, the only instrument which provides adequate safeguards for the protection of fundamental human rights".¹³⁹

From the time of independence in 1964 to 1975, Zambia had introduced no less than twenty amendments to the constitution¹⁴⁰ of which more than half of these in effect amended some portions of the bill of rights. This is the highest record of constitutional amendments to be reached among the Commonwealth African states. Professor Nwabueze surveying the uses of the amending power among the presidential regimes in Commonwealth Africa, records that including the adoption of new constitutions, there have been no less than thirteen amendments since independence in Malawi; eleven in Kenya; ten in Tanzania; six in Uganda; five in Ghana and four in Botswana.¹⁴¹

It is true that some of those amendments in Zambia were passed to enable the government to exercise some control over the foreign-owned businesses by amending the constitutional provisions entrenching the right to property.¹⁴² Yet still a number of them were intended to yield more power to the executive to deal with detained and restricted persons, thereby curtailing their rights,¹⁴³ and others still were launched for political ends specifically to enfeeble the opposition parties.¹⁴⁴

Moreover, as already observed, the bill of rights like the rest of the other parts of the constitution, can be amended (since 1969) by a simple procedure of merely securing a two-thirds parliamentary majority. This makes the rights guaranteed under the bill amenable to abridgement by the legislature at any time and without any difficulties. In this regard it is interesting to notice some contrasts with the status of fundamental rights vis-a-vis constitutional amendment by Parliament in India. In the famous fundamental rights case of Golaknath v. State of Punjab¹⁴⁵ the Supreme Court of India held that the Parliament of India had no power to amend or abridge the fundamental rights enshrined therein. The effect of this decision was indeed to make "Fundamental Rights transcendental, eternal and immutable, beyond the pale of change by a sovereign nation and its parliament".¹⁴⁶ However, the Golaknath judgment led to a raging controversy among the members of the India Parliament, and this resulted in the Constitution being amended to overcome the results of the judgment of the Supreme Court in the Golaknath Case.

In the meantime, that is three years after the Golaknath decision, the Supreme Court had changed its minds and in the case of Kesharavanda Bharati v. Union of India¹⁴⁷ it held that the constitution invested the parliament with the right to alter or abridge the fundamental rights guaranteed by the constitution, provided the "basic", "essential", and "fundamental" elements and features of the constitution

were not destroyed. These fundamental features were said to be democracy and the freedom of the individuals.

This decision, and the Indian approach generally to the protection or enforcement of individual rights, emphasize the point that there are certain subjects which the constitution deals with as fundamental and solemn parts thereof which, though amendable, call upon some implied or inherent limitations to the power of amending them in the sense that the essential features of fundamental rights and democracy as protected by the constitution cannot be destroyed. In Zambia such amendments to the constitution as those which gave power to the government to acquire compulsorily any property with almost no limitations on the exercise of that power,¹⁴⁸ or excluded the courts from entertaining (as before) detainees' applications for damage in respect of proved unlawful detentions,¹⁴⁹ or removed the freedom to form or belong to any political party (in effect abolishing an organized parliamentary opposition)¹⁵⁰ - and many other similar incidences dealt with in various parts of this work, clearly amount to a destruction of the right involved under the bill of rights. In India these types of amendments may have, in the light of the decision in the Keshavananda case, provoked some interesting judicial controversies, and presumably some of those amendments might have been struck down as invalid.

In concluding our survey of the 'form and contents' of the Zambian bill of rights, it will be observed that its provisions were carefully constructed so much so that to a government genuinely committed to upholding respect for human rights, the foundation for the realization of that ideal was undeniably laid down. However, realization of an effective protection of human rights depends not on legal provisions only, but also on how courageously the judiciary is prepared to stand in defence of the liberties of individuals by the interpretations it places on the bill of rights. Thus, the next chapters will examine the role of the judiciary in the enforcement of the guaranteed rights and freedoms under the constitution.

NOTES

1. See also Aihe, 'Neo-Nigerian Human Rights in Zambia'. ZLJ, Vols. 3 and 4 (1971 and 1972), pp.43-63; also De Smith, ibid., pp.193-99.
2. See Chapter 4 where these "circumstances" have been discussed.
3. Articles 18-32 of the 1960 Constitution; reproduced in "Basic Documents on Human Rights", edited by Ian Brownlie, op.cit., pp.56-67.
4. S.14, Kenya Independence Order in Council, Statutory Instrument No.1968.
5. S.11 of Schedule 2 to Malawi Independence Order 1964, S.1 No.916.
6. S.14 of Schedule 2 to the Jamaican (Constitution) Order in Council, 1963, S.1, No.1550 of 1962.
7. See Schedule to the Uganda Independence Order in Council 1962, S.117.
8. (1972) ZLR III.
9. Per Doyle, C.J., ibid., p.115.
10. (1971) EA 289.
11. Ibid., at p.298.
12. Ibid.
13. (1967) IAC 115.
14. Per Lord Morris of Borth-y-Gest, ibid., at pp.128-29.
15. (1970) EA 523.
16. See the Constitution of the Republic of Uganda, 1970, Ch.III.
17. Clause(1) of Art.13 provides:
 "(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say,
 (a) the taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of any property in such manner as to promote the public benefit; and
 (b) the necessity therefore is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and

- (c) provision is made by a law applicable to that taking of possession or acquisition,
 - (i) for the prompt payment of adequate compensation; and
 - (ii) securing to any person having an interest in or right over the property a right of access to the High Court, whether direct or on appeal from any other authority, for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation".

- 18. Per Wambuzi, J., op.cit., pp.538-39.
- 19. Ibid., p.541.
- 20. Cf. Chapter 1.
- 21. See Read, op.cit., at pp.30-33, for a general discussion on this subject.
- 22. An Appendix giving the Zambian Bill of Rights is included at pp.
- 23. S.14
- 24. S.15
- 25. S.16
- 26. S.17
- 27. S.18
- 28. S.19
- 29. S.20
- 30. S.21
- 31. S.22
- 32. S.23
- 33. S.24
- 34. S.25
- 35. Dr. Wheare, Modern Constitutions (1951), p.71, quoted in The New Commonwealth and its Constitution by De Smith, op.cit., at p.165.

36. Quoted by Nwabueze, op.cit., p.393.
37. See S.24 of the 1964 Constitution - before the 1969 Constitutional Amendment Act, No.5, repealing Subsection(4) and (5) of S.24.
38. See Section 18 of the Independence Constitution.
39. Section 4 of the Constitution (Amendment) (No.5) Act of 1969.
40. See Article 15(1) clauses a-j of the Constitution.
41. Article 27.
42. Cf. to Chapter IV on the politics during the Federation of Rhodesia and Nyasaland.
43. Article 25(4)(d) of the 1973 Constitution.
44. See Chapter II of the N.R (Self-Government) Constitution.
45. Section 27 of the 1964 Constitution.
46. Article 28 of the 1973 Constitution.
47. Paras. 39 and 40 of the Report of the National Commission.
48. Report of the National Commission on the Establishment of a One-Party Participatory Democracy in Zambia, Summary of Recommendations Accepted by Government, p.3 (1972), Government Printer, Lusaka.
49. Ibid.
50. See for example, Article 25 protecting discrimination on the grounds of race, tribe, place of origin, political opinions, colour or creed - but not on ground of sex.
51. S.20(1)(d), ibid.
52. SJZ, No.5 of 1970, p.66.
53. Per Skinner, C.J., ibid., at p.72.
54. (1966) 1 All NLR 178 or (1962) LLR 177. See also Gopka v. Police (1961) 1 All NLR 423; Shemfe v Police (1962) NRNLR 87.
55. Section 18(1) of the 1964 Constitution.

56. Sections 75(1), 8(1) and 16(1) respectively.
57. Constitution (Amendment) (No.5) of 1969. Discussed below.
58. Section 4, ibid.
59. Nwabueze, op.cit., p.408.
60. Discussed above.
61. See Section 20 of the Nigerian Constitution, 1960.
62. For an extended discussion on this point see, David Grove, The "Sentinels" of Liberty? The Nigerian Judiciary and Fundamental Rights (1963), J.A.L., p.152; and also Nwabueze, Judicialism in Commonwealth Africa (Enugu and Lagos, 1975), Ch.VI.
63. David Grove, op.cit., p.154.
64. SJZ, 1967/HP/273.
65. See Reg. 25(1)(2)(3) and (4), and Reg. 31(1).
66. Per Bladgen, C.J., ibid.
67. Ibid.
68. De Smith, op.cit., at p.194.
69. SJZ, 1 of 1968, available in Dr. Gupta's Zambian Cases and Materials, UNZA, p.43.
70. Emphasis supplied.
71. See David Grove, op.cit., pp.167-71; James Read, op.cit., pp.40-44; See also the following Nigerian cases: Cheranchi v. Cheranchi (1960) NRNLR 24 (1960) JAL 115; DPP v. Obi (1961) 1 All NLR 186; Williams v. Majekodunmi (1962) 1 All NLR 324, 328, 413.
72. On the subject of the compulsive aspect of judicial power once the Court is properly moved by a party to inquire into the fundamental rights dispute, See the discussion by B.O. Nwabueze, Judicialism in Commonwealth Africa, op.cit., Ch.1.
73. See S.15(1) of the 1963 Constitution, S.28(1) of the 1964 Constitution, and Article 29(1) of the 1973 Constitution.
74. See Article 28(2).
75. Article 29(3) of the 1973 Constitution, or S.28(3) of the 1964 Constitution.

76. Per Skinner C.J., in Somabhai Patel v. Attorney-General for Zambia, SJZ No.5 of 1970.
77. See Somabhai Patel v. Attorney-General for Zambia, *ibid.*, and the Patel Currency Case, SJZ, 1 of 1968.
78. Cf. Provisos to: S.22(2)(a)(b) of the 1964 Ugandan Constitution; S.25(2)(a)(b) of the 1962 Jamaican Constitution; S.25(2)(a)(b) of the 1964 Malawian Constitution; S.24(2)(a)(b) of the 1961 Sierra Leonean Constitution.
79. See Proviso to S.29(4) of the 1973 Zambian Constitution.
80. High Court Rules, Order 7 Rule 1(c).
81. Rule No.2: Uganda was probably the first African country which made these special rules, see the Constitutional Cases (Fundamental Rights and Freedoms) Rules, made under the Constitutional Cases (Procedure) Act, especially 66, Laws of Uganda, 1964.
82. Ibid.
83. Per Skinner, C.J., op. cit.
84. (1960) NRNLR 24 at pp.25-26.
85. Kachasu v. Attorney-General for Zambia, 1967/MP/273. See Dr. Gupta, op.cit., pp.22-23.
86. S.29(1) of the Zambian Constitution.
87. Quotation from Massachusetts v. Mellon (1923) 262 US 447 at 488.
88. Dwarkodas v. Scholapur Spinning Co. (1954) S.C.A. 132, and A.I.R. (1954) S.C. 119.
89. (1961) 1 All NLR 269.
90. Ibid., at p.271.
91. Ibid., at p.274, author's underlining.
92. Comments on this case by B.O. Nwabueze, Judicialism in Commonwealth Africa, op.cit., pp.63-64; and also David Grove, The "Sentinels" of Liberty? The Nigerian Judiciary and Fundamental Rights (1963) J.A.L. 152, at p.161.
93. Appeal No.6, 1972 of 4/12/72.
94. Judge President Baron, as he then was.

95. See, for example, S.22 of the 1966 Ugandan Constitution; S.25 of the 1964 Malawian Constitution; S.24 of the 1961 Sierra Leonean Constitution; S.28 of the 1963-68 Kenyan Constitution; S.28 of the 1969 Ghanaian Constitution, etc.
96. See Chapter 4.
97. Report of the Northern Rhodesia Independence Conference, 1964, Cmd. 2365, Para. 3.
98. See Ss. 19, 20, 21 and 22 of the Schedule to the Northern Rhodesia (Constitution) Order in Council 1963, Statutory Instrument No.2088 of 1963.
99. S.27(1)(2)(3).
100. The Constitution provided in Section 33(1) that "Whenever Parliament is dissolved an election shall be held to the Office of President....".
101. See S.27(2)(b) and subsection 3(b).
102. 22(1)(a) of the Self-Government Constitution, 1963.
103. S.27(1)(b).
104. S.27(4)(a)(b)(c). The costs to be paid to such a legally-aided individual include "the cost of obtaining the advice of a legal representative and, if necessary, the cost of representation by a legal representative in any court in steps preliminary or incidental to the application". S.27(6)(a).
105. Under Section 28.
106. See Article 28(2) of the One-Party Constitution, 1973.
107. For a general discussion on this topic see Denys Holland, Emergency Legislation in the Commonwealth, CLP, Vols. 9, 10, 11, of 1956, 1958 and 1960 respectively; Personal Liberty in the Commonwealth (1958) CLP 151; Nwabueze, Presidentialism in Commonwealth Africa, op.cit., Ch.X.
108. "Development and State Power" (speech inaugurating the University College, Dar es Salaam, 1964), reprinted in Freedom and Unity (1966), p.305.
109. In Kachasu's case, op.cit., at p.33 of Gupta's Zambian Cases and Materials, op.cit.
110. Refer to Chapter 3.
111. Ibid., at p.14.

112. S.13 of the Independence Order in Council, 1964.
113. Cap.106 of the Laws of Zambia.
114. See Section 13 of the Zambian Independence Order, 1964.
115. Cap. 106 of the Laws of Zambia.
116. See Section 29(1)(a) of the Independence Constitution, and Article 30(1)(a) of the One-Party State Constitution.
117. S.29(1)(b) and Article 30(1)(b) respectively, ibid.
118. See Section 3(2)(a)(b)(c)(d)(e).
119. S.3(3)(a) ibid.
120. See specifically S.3(2)(e).
121. S.5(2).
122. These included:
Preservation of Public Security Regulations, S.1, Nos. 8, 66, 104, 127, 331, 359, 370 of 1965, and S.1, Nos.15, 53, 75, 187, 218 of 1966, and S.1, Nos.116, 239, 361 of 1968, and S.1, Nos. 335 and 357 of 1969;
Preservation of Public Security (Prohibition of Certain Activities) Order, S.1, No.384 of 1969;
Preservation of Public Security (Detained Persons) Regulations, S.1, Nos. 8 and 66 of 1965;
Preservation of Public Security (Railway) Regulations, S.1, Nos. 5, 230 and 394 of 1966, and 130 of 1967;
Preservation of Public Security (Air Services) Regulations, S.1, No.76 of 1966;
Preservation of Public Security (Control of Waterways) Regulations, S.1, No.325 of 1967;
Preservation of Public Security (Control of Waterways) Regulations - The Kariba, S.1, No.273 of 1968;
Preservation of Public Security (Employers and Employees) Regulations, S.1, No.175 of 1968;
Preservation of Public Security (Movement of Vehicles) Regulations, S.1, No.231 of 1966.
123. S.3(1) ibid.
124. S.3(2)(a) ibid.
125. S.3(2)(b) ibid.
126. S.3(2)(c) ibid.
127. S.3(2)(g) ibid.
128. S.3(2)(d) ibid.
129. S.4 ibid.

130. Ezejiofor, op.cit., p.190.
131. This is, however, not to say that limitations upon governmental power through a bill of rights is the only potent method of ensuring against despotism or arbitrary rule. There are many constitutional means of attaining democratic ideals, e.g., cf. to Britain or Tanzania without bills of rights, and in the case of Britain, without a written constitution.
132. Sir Norman Anderson, "Liberty, Law and Justice", The Hamlyn Lectures, Thirtieth Series (Stevens and Sons, London, 1978), at p.36.
133. Nwabueze, Presidentialism in Commonwealth Africa, op.cit., at pp.396-97.
134. Supra.
135. Section 72(3)(a)(b).
136. Ibid.
137. Constitution (Amendment) Act (No.3) of 1969. The circumstances of his amendment are discussed below in Chapter 8.
138. Constitution (Amendment) Act,(No.5) Act, 1969. See also Article 80(1)(2) and (3) of the One-Party Constitution 1973.
139. National Assembly Debates on the Constitution of Zambia (Amendment) Bill 1975, Hansard No.33 Col.113.
140. In Presidentialism in Commonwealth Africa, op.cit., at p.405.
141. Ibid.
142. For example, Constitution (Amendment) (No.5) of 1969, S.4 is intended to nationalize the mines and other institutions in the financial and industrial sectors; also to enable the Government to acquire abandoned and therefore, idle farms.
143. See, for example, Constitution (Amendment) (No.5) of 1969, S.7 amending provisions relating to restrictions and detentions; Constitution (Amendment) (No.10) of 1969, to remove the specially entrenched procedure in favour of a simple Procedure for amending the Constitution; Constitution of Zambia (Amendment) Bill, 1974, "to provide that no court of law shall make an order for damages or compensation against the Republic in respect of anything done under or in execution or restriction signed by the President".

144. The Constitution Amendment Act, 1966, authorized forfeiture of an MP's seat on his resignation or expulsion from the Party on whose platform he was elected. This meant that those MPs who were expelled from the ruling party automatically lost seats, as happened to Mr. Mundie in 1966, and to Mr. Simon Kapwepwe in 1972, when he tendered his resignation.
145. AIR 1967 Sc.1643: 1967 SCR 1643.
146. See S.N. Ray, Judicial Review and Fundamental Rights (Eastern Law House, Calcutta, 1974), p.139.
147. (1972) 4 SCC.
148. Cited above.
149. Ibid.
150. Ibid.

CHAPTER 6

THE JUDICIAL RESPONSE TO CLAIMS OF UNCONSTITUTIONALITY

In the last chapter we noted that constitutional bills of rights in most Commonwealth African states were "justiciable" - that is, the arduous task of interpreting and enforcing the guaranteed rights was assigned to the courts. In practical terms, this meant that whenever there was a complaint by an individual alleging a violation of any of the guaranteed rights and freedoms, the individual could apply to the High Court for redress. Provided the application for redress in respect of such an alleged constitutional violation is properly before the court, the jurisdiction to hear and determine is compulsory on the part of the court.¹ If the court finds that the complaint is well founded, it is its duty to declare unconstitutional and void any executive or legislative act found to be inconsistent with any provisions of the bill of rights, to the extent of the inconsistency.

In this chapter two questions are posed, viz., To what extent has the Zambian judiciary fulfilled its role as the guardian of personal liberties and freedoms? Secondly, What does a study of the decisions on fundamental rights reveal about the way courts go about resolving the issues involved?

Unfortunately, like anywhere in Commonwealth Africa, there are relatively few cases decided upon the bill of rights in Zambia, except in respect of the right to personal liberty. It should perhaps be mentioned here that the Zambian courts have, more than anywhere in the Commonwealth African jurisdiction, dealt with more fundamental rights cases in the area of the right to personal liberty and the freedom of movement. Most of these cases have involved the courts in deciding upon

issues of the legal validity of detention orders executed by the President under the Preservation of Public Security Regulations. It is therefore suggested to discuss the theme of this chapter in relation to an examination of the judicial intervention in the area of personal liberty and the freedom of movement. The final part of the chapter is devoted to a brief discussion of the judicial intervention in the enforcement of other rights and freedoms under the bill of rights which have been the subject of judicial interpretation.

A. Personal Liberty and the Freedom of Movement

There is no doubt that the right to personal liberty and the freedom of movement (at least to the extent that it directly disturbs the physical comfort of the individual once invaded in relation to him) are the most fundamental in any society. It is therefore, a painful reality to learn that these are the two freedoms on which there has been the greatest encroachment under the emergency (or security) laws in Zambia. Emergency powers in Zambia, as in other African states are formally very wide and drastic, especially when a declared State of Emergency is in existence. A declaration of a State of Emergency, as stated in the preceding chapter, is invariably followed by the statutory empowerment of the President to detain or restrict those persons whose acts he suspects could be prejudicial to national security and public order. In this respect Zambia represents a special case in that, there, a declared State of Emergency has been in existence since 1964 (i.e., since independence) with the result that over the whole of this period the power to detain or restrict individuals has always been available to the executive for use at any moment. Quite a considerable use has been made of this power, and this has given

rise to a number of cases contested in courts on the question of the constitutional validity of some of the detention or restriction orders executed by the executive. While the President can detain or restrict any person in exercise of his powers under any of the security statutes that restriction or detention is not valid until the constitutional provisions providing for safeguards to detainees or restrictees are complied with. And the courts have to decide whether a particular detention or restriction order has been validly executed in accordance with the requirements set by the Constitution. How much judicial intervention in defence of these constitutional rights and safeguards available to detainees and restrictees has been forthcoming?

Before discussing the central theme of this chapter, it is necessary to outline briefly the formal nature of security powers in Zambia,² and the context within which the power to detain or restrict is exercisable by the government. The substance of the constitutional safeguards relied on in the cases to be discussed will also be reviewed.

1. Security Powers

i) The Declaration of an Emergency as a Prerequisite to the Exercise of the Power to Detain or Restrict

As already indicated in the last chapter, the rights to personal liberty and freedom of movement are among the rights and freedoms which, under the Constitution, can be derogated from by a law authorizing measures to be taken for the purpose of dealing with an emergency situation declared in terms of the Constitution.³ Further, as explained again,⁴ once a

State of Emergency has been declared, this brings into operation either the Emergency Powers Act,⁵ or the Preservation of Public Security Act,⁶ depending on whether a "full emergency" or a "threatened emergency" is declared. Each of these security Acts, once invoked, empower the President to make such regulations under their authority as appear to him to be necessary or expedient to control certain named public and private activities in the country and measures to maintain public security and order.⁷ In particular, such regulations may provide for the detention of persons or the restriction of their movements, and for the deportation and exclusion from the Republic of persons who are not citizens of Zambia.⁸ Regulation 33(1) of the Preservation of Public Security Regulations, for example, under which most of the detentions in Zambia have been made, read as follows: that

"Whenever the President is satisfied that for the purpose of preserving public security it is necessary to exercise control over any person, the President may make an order against such person, directing that such person be detained and thereupon such person shall be arrested...."

However, the point of emphasis here is that in Zambia there cannot be detentions or restrictions without trial except during the existence of a declared emergency.⁹

ii) Is the declaration of emergency justiciable?

Another noteworthy aspect of the President's power to declare an emergency is that the Constitution left undefined the circumstances which would constitute an

emergency, war apart. The Constitution vests the discretion to say when a public emergency exists, such as to justify the invocation of the wide powers conferred by the relevant security statutes on the President: all that is needed is his subjective satisfaction that a state of public emergency exists. The question, however, arises whether, if the President exercises his power to declare an emergency "improperly" an interested person can go to the courts to question the legal validity of that declaration by, for example, purporting to show that there was no material that could justify it or that the declaration was motivated by some ulterior motive.

The issue as to the justiciability of a declaration of emergency by the executive arose in the Malaysian case of Ningkan v. Government of Malaysia.¹⁰ In this case the appellant was Chief Minister of the State of Sarawak of the Federation of Malaysia. He received a letter from the Governor of the State calling upon him to tender his resignation on the ground that a majority of the members of the Council of Negri (i.e. Parliament) had represented to the Governor that the Chief Minister had ceased to command their confidence. After some protests from the Chief Minister on this decision, the Governor informed him that he had ceased to hold office. The appellant thereupon started an action in the High Court in which he sought a declaration that he was still Chief

Minister of Sarawak. The Court gave judgment in his favour, holding that the Governor had no power to dismiss him. Thereupon the Federal Government proclaimed a State of Emergency throughout the territories of the State of Sarawak. The Government then passed the Emergency (Federal Constitution and Constitution of Sarawak) Act 1966, which, inter alia, empowered the Government to dismiss the Chief Minister should he refuse to resign his office upon a vote of no confidence passed against the Government. By virtue of this new legislation, the appellant was removed as Chief Minister of Sarawak. He immediately brought an action in the Federal Court of Malaysia arguing, inter alia, that the proclamation of emergency was not a valid proclamation, and therefore the Emergency (Federal Constitution and Constitution of Sarawak) Act, under which the Government acted in removing him, was invalid. The appellant further argued that the clear purpose of the proclamation was to dismiss him from his office, and therefore this constituted an improper exercise of the power to declare an emergency.

On behalf of the Government it was argued that the validity of the proclamation is an issue which is not justiciable; that the power to make the proclamation is satisfied if the authority in which that power is vested is satisfied that there is an emergency or a threat to the security of the country, and that there is no limit to the grounds on which it may act. The question is not

whether an emergency exists, and that the bona fides of the proclamation cannot be attacked. It was further argued that if the Court was allowed to investigate the bona fides of the proclamation, then the question as to whether an emergency exists would be determined by the judgment of the Court and not the judgment of the Head of State.

On this issue of the justiciability of the proclamation, the Federal Court of Malaysia held that (by a majority of two to one) the validity of the proclamation was not justiciable. On appeal to the Privy Council, this issue was not (unfortunately) decided upon by the Council, which declined to do so.

Two Nigerian cases which were decided earlier on than the Malaysian case discussed above, also threw some light on the question of whether or not the discretion to declare an emergency can be questioned in court as to its validity. Under the Nigerian Constitution, the power to declare an emergency was vested in the federal Parliament. In Williams v. Majekodunmi,¹¹ Ademola, C.J.F., ruled that:

"That a state of public emergency exists in Nigeria is a matter apparently within the bounds of Parliament, and not one for this Court to decide. Once that state of emergency is declared, it would seem that according to the Constitution, it is the duty of the Government to look after the peace and security of the State, and it will require a very strong case against it for the Court to act".

The view that the existence of an emergency is a non-justiciable issue was again re-emphasized by Chief Justice Ademola in another Nigerian case of Adegbenro v. A-G,¹² in a much more clear form. There it was held that:

"...We however feel that on the question whether or not there were sufficient grounds for Parliament to declare a State of Emergency, it is unnecessary for us to rule on the submission that if Parliament acted bona fide in making a declaration of a state of public emergency the Court could hold invalid, since it is impossible to say in the present case that there was no ground to justify a declaration...."

True, as the above decisions clearly imply, the responsibility for the security of the state and for the maintenance of public order lies with the executive, not with the Courts. In Zambia, alongside many democracies in the world, the responsibility for the security of the state and for the maintenance of public order lies with the executive, not with the Courts. Thus, it is the executive which, admittedly, must be vested with sufficient power to act in advance to prevent any acts of activities which may prove prejudicial to the security of the state. However, as Baron J.P. (as he then was) pointed out whilst referring to the powers of the President under Zambian law to detain, that these:

"....are far-reaching powers. In particular it must be stressed that the President has been given power by Parliament to detain persons who are not even thought to have committed any offence or to have engaged in activities prejudicial to security or public order, but who, perhaps because of their known associates or for some other reason, the President believes it would be dangerous not to detain...."¹⁴

Therefore it appears that these powers pose perhaps the greatest threat to the liberty of individuals, in the sense that the President has uncontrolled powers to deprive any citizen of his personal liberty, and his freedom of movement on a mere belief that this person is about to engage in activities prejudicial to state security. The comparable situation in Tanzania prompted President Julius Nyerere, speaking of detention without trial, to remark that:

"It means that you're imprisoning a man when he has not broken any written law, when you cannot be sure of proving beyond reasonable doubt that he has done so. You're restricting his liberty, and making him suffer materially and spiritually for what you think he intends to do, or is trying to do, or what you believe he has done. Few things are more dangerous to the freedom of a society than that. For freedom is indivisible, and with such an opportunity open to the Government of the day, the freedom of every citizen is reduced. To suspend the rule of law under any circumstances is to leave open the possibility of the grossest injustices being perpetrated".¹⁵

iii) Reasonableness of measures taken during a declared emergency

Even when an emergency is declared the measures taken to deal with the situation must, according to the Independence (1964) Constitution, be such "as are reasonably justified for the purpose of dealing with the situation that exists during that period".¹⁶ The One-Party Constitution (1973), which will be discussed later, re-enacted this requirement, but worded it differently to read that:

"....nothing done by any person under the authority of any such law (i.e. an emergency law) shall be held to be in contravention....unless it is shown that the measures taken exceeded anything which, having due regard to the circumstances prevailing at the time, could reasonably have been thought to be required for the purpose of dealing with the situation in question".¹⁷

In other words, while the executive can take any measures under the authority of an emergency statute (even in contravention of some of the guaranteed rights under the Constitution), it is upon condition that those measures must bear some rational relationship with the purpose sought to be achieved by the emergency law in question. Thus, in one of the detention cases¹⁸ before the Court of Appeal for Zambia, it was argued that having regard to the circumstances prevailing when the arrests were made, it was not reasonable for the executive to resort to detaining the applicant rather than to prefer a criminal charge, which was a lesser measure, and therefore that detention exceeded anything which was reasonably required for the purpose of dealing with the situation in question, in terms of the Constitution. Leo Baron, Judge President, as he then was, dealt with this aspect of the applicant's argument, and ruled that

"It is not open to the Courts to debate whether it is reasonable for there to be in existence a declaration under Section 29 (i.e., a state of emergency)...."¹⁹

iv) Constitutional safeguards available to a restricted or detained person

Although the powers of detentions and restrictions that have been described are wide, the constitutions of Commonwealth African states - except that of Sierra Leone - do in fact spell out the conditions on which the lawfulness of a detention or restriction depends. Thus it is a precondition of a lawful detention that the arrest with a view to detain or restrict a person must have been effected in accordance with the requirements of law. This proposition was long ago established in Dale's case²⁰ where Brett, L.J., declared that the Courts,

"will not allow any individual to procure the imprisonment of another unless he takes care to follow with extreme precision every form and every step in the process which is to procure that imprisonment".

It should be noted that the constitutional safeguards we are about to discuss were liberally entrenched in Zambia's Independence Constitution, in favour of detainees or restrictees. Soon after independence, however, the amendment which were passed to the Constitution had the effect of attenuating the effectiveness of these safeguards, and thereby enhancing the position of the executive vis-a-vis the detaining power. It seems proper, therefore, in discussing this subject, to examine first the degree of protection afforded to the detainees and restrictees at independence, and to follow this up with the changes made to these safeguards after independence before looking at how the judiciary have so far handled cases arising from these provisions.

a) The position under the Independence Constitution

The relevant section in the Independence Constitution guaranteeing the rights of the detained or restricted persons was Section 26(2):

"26(2) Where a person is detained by virtue of such an authorization as is referred to in subsection (1) of this section (i.e. the section in the Constitution authorizing detentions under any of the emergency laws) the following provisions shall apply:

- a) he shall, as soon as reasonably practicable and in any case not more than five days after the commencement of his detention, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is detained;
- b) not more than fourteen days after the commencement of his detention, a notification shall be published in the Gazette stating that he has been detained and giving particulars of the provision of law under which his detention is authorized;
- c) not more than one month after the commencement of his detention and thereafter during his detention at intervals of not more than six months, his case shall be reviewed by an independent and impartial tribunal established by law and presided over by a person appointed by the Chief Justice;
- d) he shall be afforded reasonable facilities to consult a legal representative of his own choice who shall be permitted to make representations to the tribunal appointed for the review of the case of the detained person;
- e) at the hearing of his case by the tribunal appointed for the review of his case he shall be permitted to appear in person or by a legal representative of his own choice;

(3) On any review by a tribunal in pursuance of this section of the case of a detained person, the tribunal may make recommendations concerning the necessity or expediency of continuing the detention to the authority by which it was ordered, but unless it is otherwise provided by law, that authority shall not be obliged to act in accordance with any such recommendations".

In addition to the safeguards available to detained persons under the Constitution, the Preservation of Public Security Regulations and the Preservation of Public Security (Detained Persons) Regulations also provide for some protection for detainees whilst in prison. For example, these regulations authorize the legal representative of a detained person to interview him.²¹ They also allow his relatives to visit him and ascertain his physical and mental condition.²² The use of force by a prison officer on a detained person is prohibited "unless its use is necessary, and no more force than is reasonably necessary" can be used.²³ Further, and most important, the regulations provide for the appointment by the President of two or more persons to constitute a "Committee of Inspection" for any place of detention.²⁴ One of the functions of the Committee is to ensure compliance with the Preservation of Public Security (Detained Persons) Regulation. The Committee may also visit the place or places of detention at least once a month for inspection. The Committee is further empowered to hear any complaint (not being complaints relating to the validity of a detention order or relating to the grounds upon which such detention order was made) which any detained person may wish to make. The recommendations which the Committee makes in respect of the complaints of any detained persons are sent to the Commissioner of Prisons "without delay" for action.²⁵

Furthermore, review of a detainee's case by a tribunal within one month after the commencement of the detention, is provided for by the Preservation of Public Security Regulations.²⁶

As to the constitutional safeguards afforded to detainees under the Independence Constitution, it will be observed that these provisions were, in the circumstances of an emergency, a fair way of guarding against arbitrary treatment of those falling prey to the executive's extraordinary emergency powers. However, events after independence were soon to change the picture.

b) The position after 1969

The 1969 constitutional amendment²⁷ seriously modified both the content and the effect of the detainees' safeguards. By this amendment, which also affected several other facets of the bill of rights,²⁸ the time for furnishing grounds to a detained person extended from five to fourteen days, and the time for gazetting the detention was similarly extended from fourteen days to one month. The right to automatic review of the detention after a duration of one month was abolished altogether, and in its place was substituted a review on request made by the detainee himself: the time for the first such review was extended to one year, with yearly intervals thereafter. Further, a new clause was added which provided that, with regard to the

functioning of the tribunal established under these constitutional provisions,

"Parliament may make or provide for the making of rules to regulate the proceedings of any such tribunal including...rules as to evidence and the admissibility thereof, the receipt of evidence (including reports) in the absence of the restricted or detained person and his legal representative, and the exclusion of the public from the whole or any portion of the proceedings".²⁹

This addition to the constitutional rights of detained persons may have been deemed desirable as a way of phasing out from the detainees and the public at large information the disclosure of which might prove prejudicial to national security, or which might adversely affect some foreign power. However justified its inclusion in the Constitution may be, this provision can be used by the government deliberately to arrange the receipt and admission of evidence in such a way as to prejudice the position of a detainee, especially in cases importing controversial political issues.

When, in 1969, the Constitution was amended, in the manner described above, there was no corresponding amendment to the Preservation of Public Security Regulations, which continued to speak of automatic review within one month and thereafter at six-monthly intervals. The question therefore arose in Sinkamba v. Brian Doyle³⁰ whether the two provisions were "cumulative"; that is, was the 1969 amendment to be regarded as setting out only the

minimum rights to which the subject was entitled, and which could be supplemented by other legislation, without any risk of a conflict with the Constitution? Rejecting this view, the Court of Appeal for Zambia ^{took the view} that the provisions under the regulations which must therefore be held to have been impliedly repealed. The Court further emphasized that the 1969 amendment was not merely setting out general limits of permissible ^{derogation} but did in fact prescribe the limits of a detainee's rights.

Another effect which the 1969 amendment produced was that all the new provisions it enacted were made equally applicable to restriction. This meant, for example, that the one year period prescribed for detention, now applied also to restriction; also a restricted person in Zambia now has all the rights which a detained person has - to be furnished with grounds, to have his restriction published in the Gazette, and to have the services of a lawyer - rights to which a restrictee was not entitled before 1969. It should also be mentioned here that in none of the other Commonwealth African states are these rights available to restricted persons,³¹ and so Zambia presents a unique situation in this regard.

However, the constitutional amendment³² passed in 1974 crucially affected further the rights of detainees in a material respect. Following upon a series of cases (some of which are discussed later in this chapter) in which heavy damages were awarded against the government for unlawful detention and ill-treatment in violation of the constitutional guarantees of personal liberty, the government introduced in Parliament proposals to amend the Constitution to read that

"No court of law shall make an order for damages or compensation against the Republic in respect of anything done under or in the execution of any restriction or detention order signed by the President".³³

After a heated debate in the National Assembly, in which the weight of opinion was against the Bill because quite clearly many MPs sensed the dangers it posed to "the judicial protection of individual liberty",³⁴ the government withdrew it for modifications to some of its objectionable features. In its amended form the Bill preserved the jurisdiction of the court in respect of claims for damages or compensation arising from physical or mental ill-treatment during detention or from any error in the identity of the person restricted or detained, but not in respect of claims based on technical errors, such as failure to furnish grounds within the prescribed period, or failure to gazette

the detention. With regard to these, and in other cases in which a court of law was precluded from making an order for damages or compensation, the amendment provided that:

"....the tribunal reviewing the case of a restricted or detained person in pursuance of Article 27 may, if it finds that such person has suffered loss or damage as a result of anything done under or in the execution of a restriction or detention order signed by the President, recommend to the President that compensation should be paid to such person or to any dependent of such person, but the President shall not be obliged to act in accordance with any such recommendation".³⁵

The actual effect of this amendment was clearly to make the President an effective authority in determining the amount, if any, of compensation awarded to a detainee who has suffered loss or damage while in detention. In saying this it must be remembered that the President is also the detaining authority in Zambia. Not only this, but in the area of regulating national security, he is the real legislator of the emergency laws which confer a lot of power upon himself.³⁶ Thus in the realm of national security, the President combines and performs the functions of a legislator, executor, and now with the passage of the constitutional amendment under reference, he shares the authority to decide upon disputes of when to award compensation and how much in respect of an aggrieved detainee or restrictee. It might, however, be argued that in modern times it is not uncommon to find numerous

incidences when the executive arm of the government performs all those functions. However, when this practice is extended to cases involving personal liberties of individuals without a proper system of controlling that power, then the matter becomes pretty dangerous.

It has already been noted that the Constitution (i.e., of 1964 as amended) prescribes certain procedural safeguards to protect the detainees. It is necessary to consider how far, if at all, failure to comply with any of these procedural requirements may render a detention being held to be unlawful and invalid by the courts. It is convenient to examine this subject under two headings, viz., the question of procedural validity of a detention or restriction, and the question of substantive validity of a detention or restriction.

2. The Question of Procedural Validity of a Detention or Restriction

Under this heading there are at least five substantive items, namely, the effect of failure to supply grounds of detention and failure to publish~~ed~~ the same within the prescribed period, the effect of failure to supply a "detailed" account of the grounds of detention as required by the Constitution, the effect of failure to establish a review tribunal after one year, and finally the effect of failure to comply with the other requirements. We now discuss these as follows:

- i) Effect of the failure to supply grounds, to publish the detention, to establish a review tribunal, etc.

Chipango v. Attorney-General³⁷ was the first Zambian case which dealt with the general question of the effects of non-compliance with the procedural requirements in the Constitution consequent upon detaining a person, and in particular with the effect of failure to furnish grounds and to gazette the detention within the specified time. Thus the court here gave interpretations to important sections of the bill of rights, and the judgment was to influence future decisions bearing upon those areas of the Constitution.

In the Chipango case the applicant was detained by an order of the President made under Regulation 31A of the Preservation of Public Security Regulations, which order was executed on 12th February 1970. The grounds for his detention, which should have been furnished not more than fourteen days after the commencement of the detention, were in fact furnished on 28th February, that is, sixteen days after such commencement. The detention order, required to be published in the Gazette not more than one month after the commencement of the detention, was published on 2nd April, namely some seven weeks after the commencement. The issue before the court was whether these contraventions made the detention of the applicant unlawful.

Justice Magnus in approaching the question before him detected that the basic rule was set out in Dale's Case,³⁸ already referred to, in which Caton, L.J., said:

"I quite agree with Brett, L.J., that when persons take upon themselves to cause another to be imprisoned, they must strictly follow the powers under which they are assuming to act, and if they do not, the person imprisoned may be discharged, although the particulars in which they have failed to follow those powers may be matters of mere form".³⁹

The state submitted that this rule applies to steps to be taken before imprisonment could lawfully be effected, and that nothing which happened later could invalidate an imprisonment which had already been validly effected. In other words, the state first accepted that there were contraventions of the constitutional provisions under reference in that the grounds of detention and their publication were done outside the prescribed period. But the state's case was that these contraventions did not invalidate the detention, but merely entitled the applicant to other remedies, such as damages. This reasoning was based on the proposition that "a defect is only fatal when compliance is a condition precedent to the validity of the imprisonment, but not where it is a condition subsequent". The basis of this proposition was the analogy which counsel for the state tried to draw between a restriction of the freedom of an individual and a breach of contract. In the case of a contract, the state submitted, breach of a condition precedent prevents the contract from ever becoming operative, whereas breach of a condition subsequent need not render the contract void, but may be answerable in damages only. It was therefore urged that even in the case of a breach of a constitutional condition

subsequent to arrest, as in the instant case, the same principle applies so that the detention order is not declared unlawful, but entitles the applicant to recover damages. In reply the Court said that:

"....We are not here concerned with contractual relations between two contracting parties. We are here concerned with the right of the state to deprive a citizen of his personal liberty which is otherwise protected.... by the Constitution".⁴⁰

Magnus, J., relied heavily on the Indian authorities for the obvious reason that the Indian Preventive Detention Act 1950, has provisions which are roughly similar to those contained in the Zambian Constitution relating to detentions, and a large volume of cases decided on the Act by the Indian Supreme Court is available. Basu, a leading commentator on the Indian Constitution, has analysed and discussed most of these constitutional cases. But for our present discussion, the Zambian Court in the Chipango case adopted the view of Basu when, in dealing with the meaning of the words "as soon as may be" in the Indian provisions for bringing an accused person before the courts, he says:

"But it will be possible for the Court in a proceeding for habeas corpus to pronounce whether the arresting authority has communicated the grounds as soon as is reasonable to the circumstances, and if it finds that a reasonable time has already passed and the accused person has not yet been informed of the grounds of his arrest, the Court would order his immediate release. The reason is that the two conditions of arrest embodied in this clause are constitutional conditions subsequent to arrest, and

there is no reason to construe these conditions as other than mandatory, being valuable fundamental rights of the individual. So, even though the arrest has been initially valid, the failure to supply the grounds within a reasonable time may render further detention unconstitutional or illegal".⁴¹

On the authority of this principle as stated by Basu, Magnus, J., held that the requirements that the detainee be furnished with grounds of his detention, and that the same be published as provided for by the Constitution:

"....are constitutional conditions subsequent to arrest, they are mandatory and fundamental rights of the individual, and if they are not followed, I can only conclude that such non-compliance must render further detention unconstitutional and unlawful".⁴²

The Court, however, left one vital question unresolved, namely, that assuming that non-compliance with Paragraphs (a) and (b) of Section 26A(2) renders further detention unlawful, as was so held in this case, does the same effect apply to failure to comply with the remainder of the conditions specified under Section 26A(2) - which relate to a review of a detention by a tribunal at the request of the detainee, affording his reasonable facilities to consult his lawyer of his own choice, and the right to appear in person or by a legal representative of his own choice? Magnus, J., merely made a passing comment when he replied to this question in the following terms, that:

"It may well be that if for example, under Paragraph (c) a detainee requests a review after he has been in detention for a year, and review is not carried out, or is not carried out in accordance with the paragraph, then he is entitled to be released. It may even be that breaches of the other two paragraphs will have the same effect. I do

not have to decide that in this case, and therefore, the point must be left open for the future".⁴³

On appeal to the Court of Appeal the State based their grounds of appeal on two sets of arguments. First, it was contended that the court below erred in holding that failure to comply with the constitutional conditions to supply grounds of detention and its publication in the Gazette out of the specified time rendered an originally valid detention order invalid. It was argued that those conditions were all conditions subsequent to the detention order and could not affect the validity of that order, but that failure to observe them would open the way to other remedies, such as mandamus. In the second place, it was submitted that the section in the Constitution embodying the detainees' rights (i.e. Section 26(A)(2)) must be taken as a whole, so that the effect of non-compliance with any one of its paragraphs must have the same effect. But, the State argued, this cannot be so, because it would have the effect of producing some blatant absurdities - as, for example, holding that failure to comply with condition (e), which relates to representation before a tribunal, should invalidate the originally valid detention order. Thus, the "unresolved" issue in the court below came up again on appeal, and we should perhaps note how the Appeal Court attempted to resolve it.

With respect to what we have called the "unresolved" issue in the court below, Doyle, C.J., held that:

"....I would not agree with the contention of the learned Attorney-General that each of the conditions set out in Paragraphs (a) to (e) of Section 26A(2) are in the same position and that failure to comply has the same result in each case. The Courts have in the past held that where a provision lays down a number of requirements, some might be held to be mandatory⁴⁴ while others might merely be directory".

And later on in his appellate judgment the Chief Justice remarked that the conditions under Section 26A(2) "appear to be in some order of descending importance" - thereby implying that some conditions under the relevant section in the Constitution may not have the effect of invalidating a detention order. In a later case,⁴⁵ the High Court for Zambia held that where, pursuant to Section 26A(1)(k) of the Constitution, the detainee had requested the review of his case, and that was not done for over three months after such a request was made, although in these circumstances "an unreasonable delay [had] occurred..." in making such a review, "the proper remedy", however, "does not lie in a writ of habeas corpus" but in other remedies which would secure the constitution of a tribunal, i.e. mandamus: and that ^{at} most habeas corpus would be an ultimate remedy if one fails to get the review.

So, in fact, the Zambian Courts have laid down the principle that not every one of the procedural safeguards available to a detained or restricted person would, if not observed, render the detention order invalid, and that non-compliance with some of them may in fact be answered with other remedies, such as damages or an

issuance of an order of mandamus directing the detaining authority to comply with the requirements of the law. This is one aspect in which the Indian provisions differ from the Zambian ones, since with respect to the former, non-compliance with each and every one of the "safeguards against arrest" renders the detention invalid.⁴⁶ The differences in the degree of effectiveness between the Indian and Zambian provisions was acknowledged by Doyle, C.J., when he said that "it must be borne in mind that the Indian safeguards are effective - indeed much more effective than those provided in Section 26A...." In the Indian case of Ram Krishnan v. State of Delhi,⁴⁷ the Supreme Court of India expressed itself as to why it traditionally assures a solid stand against any attempted invasion of the safeguards under reference. The Court explained that:

"Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against improper exercise of the power must be jealously watched and enforced by the Court".⁴⁸

On the other hand, the words of Chief Justice Doyle of Zambia in respect of the same matter ring a little faint when he declared that:

"Section 26A appears in a part of the Constitution which has formally and deliberately set out to enshrine the rights and freedoms of the people of Zambia. It is a section introduced to provide for the protection of those rights and freedoms and where possible

it should be interpreted effectively to protect the rights and freedoms. That the protection given is a limited protection is no reason for cutting down what is given".⁴⁹

However, ~~the~~^{the} more substantive issue of appeal in the Chipango Case was, as pointed out earlier, whether the requirement that supply of grounds of detention and its publication would, if not done within the constitutionally prescribed time, make a detention order invalid (as was held by the court below) or whether the omission would be remedied by damages or an order of mandamus. It is interesting to note that in their approach to this question, the Courts in Zambia have declined to follow authorities available from within Commonwealth African jurisdiction, and, in one instance, an English authority directly on the subject. They have instead adopted the Indian authorities, at least in the interpretation of Zambia's detention laws.

For instance, the decision in the Ugandan case of Ex Parte Matovu⁵⁰ was directly in point as regards the consequences of non-compliance with the provisions of Section 26(A)(1)(a) of the Zambian Constitution. In this case a person had been detained under the Ugandan Emergency Legislation. Section 13(1)(a) of the Ugandan Constitution required that such a person should be served with a statement of the grounds for his detention. Although in this case grounds for detention were supplied

to the detainee apparently within the prescribed period, it was in issue whether the statement of those grounds was sufficiently specific to meet the requirements of the constitutional provision. This being the case, the applicant argued that the particular section in the Constitution had, in fact, not been complied with. Sir Udo Udoma, C.J., who pronounced the judgment of the Court, ruled:

"Insufficiency of the statement of the grounds of detention served on the applicant is a mere matter of procedure. It is not a condition precedent but a condition subsequent. We hold therefore that it is not fatal to the order of detention made by the Minister. It is curable because the High Court under Article 32(2) of the Constitution, has the power to give such directions as it may consider proper for the purpose of enforcing or securing the enforcement of any of the provisions [under the bill of rights]".⁵¹

In the High Court for Zambia, Magnus, J., had rejected the findings of Udo Udoma in the above case, "particularly" because "he seemed to base his finding on a distinction between condition precedent and condition subsequent, which I have already said is more appropriate to the law of contract than to cases relating to the liberty of the subject". And in the latter Zambian cases which we will be discussing in due course, Zambian courts have not agreed entirely with Chief Justice Udoma's statement that insufficiency of grounds of detention is not fatal. True, as Justice Magnus seems to imply, where an individual has been deprived of his liberty through having been detained he is, or must be, entitled to know

the reasons for his detention so that he can utilize these for the purposes of making representations to a review tribunal or the detaining authority in order to secure his release. He can only do this if the alleged grounds of his detention are stated more precisely and in a sufficiently detailed form. We discuss the subject of the effect of supplying vague or insufficient grounds of detention later.

Moreover, the Court of Appeal has ruled as unacceptable the argument that, admitting that the time set for the communication of grounds and publication of the detention had expired, the state can remedy the situation by giving notice of grounds and publication in the gazette immediately it discovers the omission, albeit out of time. Gardner, J.A., in the same Chipango case observed that:

"As soon as the executive discovered that the time for service of notice or issuing a publication had expired the remedy was entirely in its hands, that is to say, a new order for detention could have been made and thereafter the terms of Section 26A could very well have been observed".⁵²

But in a later case of Re Puta⁵³ an interesting analogous issue arose. The applicant had been detained by the

President pursuant to the Preservation of Public Security Regulations. The detention order proved to be defective because it recited a wrong section of the regulations on authorizing detention. The executive, on discovering this four days later, immediately revoked it and replaced it

with a fresh one. The revocation of the original order took place before the expiry of fourteen days - the time required to communicate grounds of detention. The applicant claimed that there were two separate detentions which required two separate statements specifying the grounds of detention. In other words, the applicaⁿ~~ta~~ was saying that there was an obligation on the part of the executive to supply grounds in respect of the original detention order which was revoked within fourteen days. He further claimed that a person detained for any period of time, no matter how brief, must be supplied with the necessary grounds, otherwise such detention becomes invalid. It will be recalled that the relevant provision in the Constitution about supplying grounds, provides that "as soon as is reasonably practicable and in any case not more than fourteen days" after the commencement of the detention the grounds must be furnished. After citing, with approval, the remarks by Doyle, C.J., in the Chipango case, to the effect that "a person is entitled to know within a short period why he is detained", Cullinan, C.J., in the Re. Puta case held that:

"I would venture to say therefore that the emphasis is upon the obligation to furnish grounds as soon as is reasonably practicable rather than within fourteen days. Furthermore, while it seems that a detaining authority is under no constitutional obligation to furnish grounds in respect of a detention which has been revoked within fourteen days.....I would have thought that grounds should nevertheless be furnished subsequent to revocation if only to establish the bona fide of the detention order and to establish that it was not

reasonably practicable to furnish grounds during the brief detention..... With [this] qualification.....the executive was under no strict constitutional obligation to furnish grounds in this case in respect of the first detention".⁵⁴

In other words, the Zambian courts have endorsed the view that the Executive has power lawfully to detain a person for any period up to fourteen days, and provided that he was released within that period, no grounds need be furnished. This, in effect, means that an individual who is detained within the period of less than fourteen days (one month now) cannot even claim compensation, assuming that he was unlawfully imprisoned, since according to the constitutional amendment of 1974, which we have discussed above, it is only those detainees who can establish procedural irregularities in their detentions who are entitled to claim compensation from the reviewal tribunal which, in any case, can be established after a period of one year.

Coming back to the arguments before the Court of Appeal in the Chipango case, another high English authority, Greene v. Home Secretary,⁵⁵ was cited, in addition to Ex Parte Matovu⁵⁶ to establish the point that breach of the requirement to supply grounds of detention within the statutory specified period does not invalidate the otherwise originally valid detention. The appellant in that case had been detained under the United Kingdom Defence (General) Regulations, 1939. The Advisory Committee to whom the appellant made objections was

required by paragraph (5) of Regulation 18B to give the appellant the correct reasons for this detention. This, by mistake, the Committee failed to do. However, the House of Lords held that the mistake did not invalidate the order for detention. Lord Macmillan, who dealt with this matter at length, made the following relevant remarks:

".....Nothing could be more unfortunate than that in a matter in which scrupulous accuracy is imperative the impression should be created that the safeguards prescribed for the protection of detained persons are carelessly observed and administered. The Court of Appeal has found that the appellant has not suffered any material prejudice by reason of the error.....I have, however, to point out that what is before your Lordship is an application for a writ of habeas corpus and that the appellant's complaint is that he has been and is being detained without any legal reasons. The mistake, the occurrence of which your Lordships deplore, does not in any way affect the validity of the detention order which is the answer to the appellant's application. It affects the due observance of the procedure prescribed for the further consideration of the case of a person who is ex hypothesi under lawful detention. Consequently the mistake affords no ground for invalidating the detention order and does not help the appellant in his present application...."⁵⁷

The Court of Appeal, however, declined to follow the English and Ugandan authorities in preference to the Indian decisions. Hence the Court of Appeal upheld the judgment of Magnus, J., in the High Court by ruling that the Constitutional provisions under discussion "must be adhered to strictly and failure to do so causes further imprisonment under the detention order to be invalid". However, the basis of differences between the English and the Zambian approach might be explained on the ground

that the Zambian court was primarily concerned with the interpretation of the constitutional provisions as opposed to a mere statutory provision, as was the case in the English situation referred to above. It is difficult to understand why the Zambian courts have refused to follow the Ugandan authority in preference to those of the Indian Supreme Court, since like in Zambia, the Ugandan Constitution was very similar to that in Zambia and embodied all these procedural safeguards of detainees. Quite clearly the Zambian judges might have perceived that the principle enunciated by Chief Justice Sir Udoma was unsound.

ii) The effect of supplying insufficient or vague grounds for detention

It will be recalled that the constitutional provisions embodying the safeguards available to detained or restricted persons stipulate that where a person's freedom of movement is restricted or he is detained under any of the emergency laws discussed above, it is his constitutional right to be furnished with a statement in writing

".....specifying in detail the grounds upon which he is restricted or detained".⁵⁸

This "statement" is to be made out and supplied by the detaining authority - in Zambia this is the President. As is to be expected, the question has frequently arisen before the courts calling upon them to say what exactly is meant or implied by the phrase "specifying in detail". Apart from having to face the task of defining

the scope of this phrase, "specifying in detail" the grounds of detention, the courts have also to say what the effect would be in cases where they find that the grounds supplied to a detained person are not sufficiently detailed to enable him to know what is being alleged against him.

Happily, the courts in Zambia have been able to provide some responses to the questions posed above in a series of cases. Again, in the determination of these questions the courts in Zambia have tended to follow the Indian decisions, but in at least one notable instance, the West Indian high authority on this subject has been adopted with approval.

The first attempt by a Zambian court to give meaning to the words "specifying in detail" as used in the Constitution, was the view expressed by Magnus, J., in the Chipango case when he said that the grounds supplied to the detainee "must be at least particularized as they would be in a pleading in an ordinary action". On appeal to the Court of Appeal, this view was rejected and indeed subsequent cases, discussed below, since the Chipango case in Zambia have similarly refused to adopt Magnus' definition of "specifying in detail".

The most celebrated Zambian decision which dealt directly with the questions in how much detail should the grounds for detention be communicated to the detainee, and what is the effect of failure to satisfy this requirement, was the Kapwepwe and Kaenga v. Attorney-General.⁵⁹

Although the case of Kapwepwe and Kaenga came before the Court of Appeal for Zambia as a single appeal, it was agreed that, in effect, there were two separate applications which referred to different persons and were based on different facts - and in any case were separately made to the High Court. Here, because the grounds stated for the detention of Kapwepwe and Kaenga, respectively, varied and because the decisions of the courts in respect of the two applications were different, it is proposed to deal with the two cases individually.

Simon Kapwepwe was detained on 4th February 1972, by an order made under the Preservation of Public Security Regulations. The grounds stated for his detention were that during the months of December 1971, January and February 1972, he and other members of his United Progressive Party ".....conspired to engage in activities to endanger the safety of persons and property", in consequence of which, eighteen named persons were assaulted and threatened with death and the property of twenty-three named persons was damaged; also that during those same months he and other members of his party likewise ".....conspired to be deviant of and disobedient to the law and lawful authority and published by word of mouth and by way of circulars, statements, defamatory and contemptuous of the Head of State and the Government".

The question before the court was whether the statement of grounds as stated above complied with the constitutional requirement to give grounds "in detail". In considering

what amount of detail can be said to be sufficient in any given case to comply with the Constitution, the court had first to consider the character of the relevant constitutional provisions and the objects which they were designed to achieve. No clearer definition of the object of these provisions can be found than that which Lewis, C.J., gave in the West Indian case of Herbert v. Phillips and Sealey.⁶⁰ The Constitution of St. Christopher, Nevis and Anguilla, on which the case was based, contains a bill of rights closely resembling that of Zambia and has similar provisions relating to the rights of detainees. Moreover, it also has a stipulation to the effect that a detained person must be ".....furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is detained". Delivering the judgment of the Court of Appeal of the West Indies Associated States, Lewis, C.J., elaborated on the objects of the constitutional stipulation under reference in the following manner:

"The object of requiring a detainee to be furnished with a statement specifying in detail the grounds upon which he is detained is to enable him to make adequate representations to the independent and impartial tribunal which the same section of the Constitution requires to be set up for the review of his case. The statement is not required to contain the evidence which has come to the knowledge of the Governor..... But it must, in detailing the grounds for detention, furnish sufficient information to enable the detainee to know what is being alleged against him and to bring his mind to bear upon it. A ground which is vague, roving or exploratory is insufficient to enable a detainee to bring his own mind to bear upon

any acts or words of his which may possibly have attracted the attention of the authorities and from which the Government has drawn conclusions adverse to him which satisfy [the detaining authority] that it is necessary to exercise control over him. With such a ground an innocent person would not know where to begin with the representation of his case to the tribunal....."

".....It is the detainee against whom action has been taken, it is his acts and words which have been the subject of investigation by the executive, and he is entitled to be told sufficiently to enable him to explain them or to refute the conclusion before the tribunal, if he is able to do so....."⁵⁴

Further, the decisions of the Indian Supreme Court in State of Bombay v. Atmaran,⁶² and Naresh Chanda v. the State of West Bengal⁶³ had further laid down criteria of what is, and what is not, a "vague" ground. In the former case, Kania, C.J., states that:

"....'vague' can be considered as the antonym of 'definite'. If the ground which is supplied is incapable of being understood or defined with sufficient certainty it can be called vague...."⁶⁴

On the other hand,

".....If on reading the ground furnished it is capable of being intelligently understood and is sufficiently definite to furnish materials to enable the detained person to make a representation against the order of detention it cannot be called vague".⁶⁵

Further, these Indian authorities have also laid it down that "vagueness" is a "relative term" - that is, its meaning must vary with the facts and circumstances of each case. And:

"it is.....improper to contend that a ground is necessarily vague if the only answer of the detained person is to deny it".

Baron, Judge President, for example, gave a thorough illustration of the application of this last test and by reference to possible ways in which the grounds of detention might be set out. If, for instance, the grounds were a mere recitation of the relevant legislation, as for instance:

".....a belief that you have engaged or are likely to engage in activities prejudicial to the preservation of public security...."66

In the above situation,

"it is clearly impossible for the detained person to do no more than deny that he has ever engaged, or would ever engage, in such activities",

and such a representation would obviously have no chance whatever of success.

But suppose the grounds were:

".....a belief that during the month of January you advocated the use of violence against persons of different political or tribal affiliations...."67

In this case the detained person could make representations on the basis of either alibi or mistaken identity and also on the merits. He could, for instance, say that he never addressed a meeting in the place mentioned, or he could say that during the month in question he was engaged in a course of study outside Zambia. If any of these representations is advocated, the detaining authority

would, no doubt, initiate immediate enquiries to establish the truth of these statements which, if true, must mean that a mistake had been made. On the other hand, the detainee may agree with the fact that he addressed meetings during the months in question to the associations mentioned, but deny that he ever advocated violence of any kind.⁶⁸ It is this representation which is no more than a denial which cannot render the information given to be inadequate only for that reason - i.e., of having denied it.

With these expositions of the way courts in India and the West Indies have approached the interpretation of somewhat similar provisions, the Court of Appeal for Zambia came back to the issue of what the phrase "in detail" as used in Section 26(A) of the Zambian Constitution means. As in the case of the identical preventive detention legislations in India and the West Indies that we have referred to, the Court of Appeal held that the whole of Section 26(A)(1), embodying safeguards for detained persons in Zambia,

".....is directed to providing machinery to enable a detainee to make representations to the detaining authority and to the tribunal established by [the Preservation of Public Security] regulation 33(7) for the purpose of obtaining relief; it is to this end that 'grounds in detail' must be furnished. Such grounds must enable the detainee to make representations not only on the basis of mistaken identity, alibi, and the like, but also on the merits; the detainee must be put in a position where he can dispute the truth of the allegations against him".⁶⁹

How then did the foregoing tests apply to the grounds supplied to Kapwepwe? It will be recalled that the first ground given to him alleged a conspiracy during stated months with other members of the United Progressive Party to endanger the safety of persons and property, and further alleged that, in consequence of that conspiracy, a number of people were assaulted and threatened with death and the property of a number of people was damaged or destroyed. The applicant argued that there was insufficiency of detail here, in that the persons with whom he was alleged to have conspired were not named, and further that the precise nature of the conspiracy was not stated. Baron, J.P., promptly replied that:

"I am unable to accept this argument; the detainee has been told the nature of the conspiracy, the period, and that the conspiracy was with other members of the United Progressive Party..... It may well be that in the face of an allegation such as this the only representation the appellant could make.....would be a denial, but it cannot possibly be said that he does not know what is alleged against him".⁷⁰

The second ground communicated to Kapwepwe, it will be recalled, was a conspiracy during the stated months with other members of UPP to be deviant and disobedient to the law and lawful authority, and to publish material and circulars defamatory and contemptuous of the Head of State. Doyle, C.J., remarked that "the material and circulars made on behalf of the Party are

within the knowledge of the detainee". However, the appellant attacked this ground on the footing that it did not disclose in what way the appellant conspired to be deviant of and disobedient to the law and lawful authority. This argument again the court turned down, since it was common ground that the appellant knew what was being alleged against and from there could make a meaningful representation.

On the other hand, the grounds upon which Kaenga was detained were that he was alleged to have conspired between August 1970 and September 1971 with others to publish circulars which were subversive, and which among other things, claimed that duly elected members of the Government, including His Excellency the President, were not Zambian nationals; secondly, that during the same period he had been actively engaged in organizing the UPP in a manner designed to create tribal conflict; and thirdly, that he had conspired and assisted others, or that his activities in furthering the aims of the UPP, knowingly or unknowingly, had assisted in obtaining from governments hostile to Zambia materials, including fire-arms, and the training of Zambian nationals with the intention to dislodge by unlawful means the legally constituted government.

By a majority decision of two to one the Court of Appeal held that, while the rest of the grounds supplied to the applicant were not vague and that on them he could

make a meaningful representation, the second ground, relating to allegations that the applicant had been engaged in organizing the UPP in a manner designed to create tribal conflict, was vague because:

".....the detainee could not possibly know to what particular physical manner he himself acted to bring about the alleged intention to create tribal conflict".

The incidence of the Kaenga application is clearly illustrative of a situation where some of the several grounds supplied are vague while the rest remain valid. Does this render the detention invalid? In the case discussed above, the Court of Appeal in fact necessarily implied that the detention would become unlawful if one of the several grounds supplied to the detainee is vague. However, no reasons were given to justify this rule. But Basu explains that in India, where this rule obviously originated, the courts have held that the rule is justified on the basis that:

".....it can never be certain to what extent the bad reasons operated on the authority or whether detention order would have been made at all if only one or two good reasons had been before them. In such a case, the Court is bound to quash the order, unless it can be predicated that the irrelevant ground was of an unsubstantial or inconsequential nature".⁷¹

Four years after the decision in Kapwepwe and Kaenga was given, another interesting case based on similar issues came for decision before the High Court for Zambia. The case of Gilbert Mutala v. the Attorney-General⁷² is of interest here because of the manner in which it was

distinguished from the Kapwepwe and Kaenga case and also because, in this particular instance, a detention order was declared unlawful because, in the view of the presiding judge, Bweupe, "...the grounds furnished to the applicant are so vague that he cannot make meaningful representations to the detaining authority or any tribunal."

The applicant sought a declaration that his detention under Regulation 33(1) of the Preservation of Public Security Regulations was unlawful by reason of the fact that the detaining authority had not complied with Article 27(1)(a) of the Constitution which requires that the applicant be furnished with a statement in writing specifying "in detail" the grounds upon which the applicant is detained.

The statement furnished to the applicant read as follows:

"That between 1st January 1971 and 11th December 1973 you conspired with other persons in Zambia to commit crimes and that you organized and managed the commission of serious crimes in Zambia which acts are prejudicial to the security of the Republic of Zambia".

The Court held that these grounds were not detailed enough to meet the standard envisaged by the Constitution. Bweupe, J., argued that since the applicant was alleged to have "conspired with other persons.....to commit crimes" and that he "organized and managed the commission of serious crimes", there was no doubt that, when the

detaining authorities referred to "crimes", they must have meant "crimes" in the Penal Code. But under this code there are numerous crimes ranging from misdemeanours and felonies to treasonable acts, so that "the applicant was left to wonder as to whether he conspired with others to commit and organized and managed the commission of, say, treason, stock theft, murder, aggravated robbery, kidnapping, rape....". "This", his Lordship continued:

"was not the intention of parliament that the detainee should be left in the dark..... It is my considered view [therefore] that the grounds as given would not assist the applicant to direct his mind to them if he decided to make meaningful representations".

In other words, what the court was saying was that the detaining authority was under a duty to specify the nature of the crime which the applicant was alleged to have conspired to commit. This finding was in line with the decisions of the Supreme Court of Zambia in Eleftheriadis v. the Attorney-General, and in the Kapwepwe and Kaenga case discussed above. In the former case, for example, the grounds read:

"That between the 1st day of December 1973 and the 31st day of January 1974, you conspired with persons within Zambia to corruptly procure import licences of the Republic of Zambia enabling Kingstones (Zambia) Limited to import goods without valid import licences...."

The difference in this case the Mutale case under discussion is that in the Eleftheriadis case the nature

of the crime was named which was to "corruptly procure import licences". The same applied to the Kapwepwe and Kaenga case where particular crimes were cited alleged to have been committed by the applicants, namely conspiracy to assault, to cause death, to damage or destroy properties, and to publish statements defamatory of the Head of State and Government.

However, the question can be asked here, was it really necessary for the detaining authority to name in specific terms the crime or crimes which the applicant was alleged to have conspired to commit? In other words, was it insufficient for the executive merely to make a general reference to the activities of the applicant prior to the arrest and for the executive to refer to these activities as amounting to "crimes", not in a specific, legal sense of the word, but in its general usage. This is a point of immense significance here, because the authorities relied upon in the Mutale case also tend to support the proposition that the allegations against the detainee need not be particularized in the sense of containing all details of facts. In State of Bombay v. Arma Ram Vaidya,⁷⁴ which (though in point here) was not referred to by Bweupe, J., in the Mutale case, Kania, C.J., said that:

"By their very nature the grounds are conclusions of fact and not a complete detailed recital of all facts".

Further, the dicta of Doyle, C.J., in the Kapwepwe and Kaenga case (to which Justice Bweupe referred) seem to suggest that use of "general language" in a statement of grounds does not, ipso facto, render those grounds vague, but that:

"It is a matter of fact in the particular circumstances of each case what and how much detail must be given. Where facts are notorious or the detainee must himself know them, it cannot be said that a failure to refer in the ground to these facts causes the ground to fail to be in detail".

However, even after citing this dictum His Lordship still insisted that this passage had no relevance to the present case, where no particular crime is mentioned in the grounds furnished. But, in the particular circumstances in which this detention arose, it could have been argued that the crimes referred to in the grounds supplied were within the knowledge of the applicant. The reason for saying this was as follows: prior to his being detained, the applicant had been convicted by the High Court on three counts of the crime of "Aggravated Robbery", and was sentenced to twenty-five years imprisonment on each count to run concurrently. The applicant appealed to the Supreme Court against these convictions and sentences. The appeal was allowed, and the convictions set aside. The applicant was not, in fact, released from custody, but instead the Assistant Superintendent of Police, on learning of the decision of the court, served the applicant with a detention order exercising his powers under the Preservation of Public Security

Regulations.⁷⁵ After six days this order was revoked and simultaneously replaced by a detention order signed by the President pursuant to his exercise of the powers under the Preservation of Public Security Regulations.⁷⁶ However, in these circumstances the applicant must have known that his detention followed his trial for the criminal offence of aggravated robbery and the consequent failure by the state to secure his conviction. Moreover, there was no interruption of events from the time of his arrest for the crime of aggravated robbery, his trial for this offence and his conviction by the High Court, his acquittal by the Supreme Court, his detention by the police officer, and finally his formal detention by the President. In these circumstances, was it really necessary for the detaining authority to specify that the crime which the applicant allegedly committed was that of aggravated robbery? As Lewis, C.J., has said, the detainee himself will be deemed to know

".....the acts or words.....which may possibly have attracted the attention of the authorities and from which the detaining authority has drawn conclusions adverse to him which satisfy the detaining authority that it is necessary to exercise control over him".⁷⁷

Once he has this information the detainee is able to bring his mind to bear upon what he knows he did, and to make meaningful representations.

3. The Question of Substantive Validity of Detentions

The question under consideration here has two dimensions to it: in the first place, there is the question whether the

executive can detain a person on allegations or grounds which clearly constitute a criminal offence or offences; secondly, can the executive detain in a situation where a person has been prosecuted and acquitted of a criminal charge - basing his (the executive's) grounds of detention on the same allegations on which a person has been cleared by the courts?

The first question arose in the Kapwepwe and Kaenga case, discussed above. In that case it was urged, inter alia, on behalf of the first applicant (Mr. Kapwepwe) that the discretion to detain him was wrongfully exercised because the grounds stated for the detention amounted to criminal offences, for which a criminal prosecution could have been instituted. This at once raised the question of the nature of the relationship between the grounds for a detention order and those for a criminal prosecution. This question was dealt with in clear terms by the Court of Appeal through Baron, J.P., (as he then was) in the following manner, that:

"The machinery of detention or restriction without trial.....is, by definition, intended for circumstances where the ordinary criminal law or the ordinary criminal procedure is regarded by the detaining authority as inadequate to meet the particular situation. There may be various reasons for the inadequacy: there may be insufficient evidence to secure a conviction; or it may not be possible to secure a conviction without disclosing sources of information which it would be contrary to the national interest to disclose; or the information available may raise no more than a suspicion, but one which someone charged with the security of the nation dare not ignore; or the activity in which the person concerned is believed to have engaged may not be a criminal offence; or the detaining authority may simply believe that

the person concerned, if not detained, is likely to engage in activities prejudicial to public security...."⁷⁸

An Indian Supreme Court Judge, Mukherjee, summarized neatly the argument that the executive can detain irrespective of whether or not the grounds on which a person is detained amount to a criminal offence. In Gopalan v. State of Madras,⁷⁹ Mukerjee, J., said:

"...Preventive detention.....is not a punitive but a precautionary measure. The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge formulated; and the justification is suspicion or reasonable probability and not criminal conviction which only can be warranted by legal evidence".

Further, it can be said on behalf of the government that it has the right to choose which legislation, penal legislation or a preventive detention legislation, etc., it intended to enforce in order to achieve the object in view in any given situation. It is common knowledge that if it chooses to enforce a penal offence under a penal code, the state faces the burden of proving its case beyond reasonable doubt - a consequence which the executive can try to avoid by merely preferring to exercise its discretion to detain under the preventive detention legislation, since again here there is no onus on the detaining authority to prove any allegations beyond reasonable doubt, nor indeed is he required to support any suspicion on which he bases his satisfaction of the necessity to detain. The point, however, is that both the Zambian and Indian authorities are unanimous in support of

the proposition that there is no legal obligation on the executive to prosecute in the criminal courts, even in situations where the grounds of detention amount to one or more offences under the criminal code. But a contrary view worth pointing out here was expressed by the minority (Mahajan and Mukherjee, JJ) in the Indian case of Ashutosh v. State of Delhi.⁸⁰ To them,

"There could be no better proof of mala fides on the part of the executive authorities than a use of the extraordinary provisions contained in the Act (i.e. the Indian Preventive Detention Act, 1950) for purposes for which ordinary law is quite sufficient".

But this is again to miss the point we have discussed above, namely that the grounds for a detention order and for a criminal prosecution are entirely different: the first aims at preventing the commission of what is considered prejudicial to the state, the activities intended to be prevented may or may not amount to a criminal offence: therefore, merely because the allegations for a detention may have been sufficient for a criminal prosecution and the detaining authority did not prosecute is not necessarily proof of mala fides on the part of the executive authorities.

The second aspect of the question of substantive validity of detentions takes the matter discussed above a little further. Here the position is that an order of detention has, in fact, been made against a person on the very grounds on which he has been prosecuted in the ordinary courts. Can the executive effectively detain in these circumstances? On the face of it,

it can be contended that by such order of detention the ordinary laws (as opposed to the extraordinary laws of preventive detention) are circumvented and the court's orders defeated.

The question posed above arose in a neat form in another Zambian case of Re Henning Buitendag.⁸¹ The applicant in this case applied to the court for a writ of habeas corpus ad subjiciendum. He had been tried before the High Court on four counts under the State Security Act and was acquitted on all four counts. On the same date he was detained by order of the President under Regulation 33 of the Preservation of Public Security Regulations. And on the thirteenth day after he was detained he was furnished with a statement specifying the grounds upon which he was detained. The court found that:

"It is not disputed that those grounds are identical to the particulars of the fourth count on which he was acquitted at his trial".

The applicant urged that his detention was therefore unlawful.

The Indian authorities, to which Cullinan, J., referred, had held that an order of detention is not mala fide by reason merely that the order was made after failure to secure a conviction under the criminal law;⁸² similarly, where there is a pending criminal case against a person - if the case is withdrawn and an order of detention is made against him, the order is not necessarily mala fide.⁸³ Further, the Indian authorities have held that there is no rule of law that where a person can be prosecuted under the ordinary criminal law, no order of detention can ever be made against him.⁸⁴ Finally, that the

proper approach is to consider the facts of each case to determine whether the order was mala fide or not.⁸⁵

With the assistance of these principles derived from the Indian decision, Cullinan, J., concluded that:

"It seems to me that where a detaining authority decides to lay a criminal charge rather than detain he is not then precluded by an acquittal per se from doing that which he always had power to do, that is, to detain. I do not see therefore that there can be any general rule that where a detaining authority decides first to lay a criminal charge that he cannot then detain when the allegations are not proved to ^{the} court's satisfaction beyond reasonable doubt".⁸

Nowhere is the harshness of detention more evident than what is implied in these decisions, for it means that a person who is found not guilty by a court of law on a particular set of facts, can still face imprisonment on those very facts. One would have thought that the executive should be obligated to give a fresh set of grounds of detention other than those upon which a criminal charge failed.

At this point it is appropriate to make the point that so far the cases we have been discussing above show that courts in Zambia have tended to approach the interpretation of constitutional provisions embodying the safeguards of detainees with boldness, in that they have not hesitated to strike down a detention order as invalid if the executive fails to observe the procedural requirements attendant upon arresting an individual. Two factors, at least, have contributed to the proposition that the Zambia judiciary has not, after all, performed all that badly in the enforcement of some aspects of the freedom of personal liberty. First, its refusal to

adopt the English, and even some of the Commonwealth African, decisions which, as we have seen, have declined to hold that a slight procedural mistake in effecting a detention order, or failure to comply strictly with the conditions imposed by law in arresting a person, renders the imprisonment unlawful. Secondly, the courts' inclination to follow Indian decisions in the determination of cases involving the constitutional provisions relating to personal liberty, and in particular to detentions, has been the major factor in influencing the judiciary's interpretation of the constitutional provisions embodying the rights of detainees. This attitude has been one of "following in the footsteps" of the Indian Supreme Court in ensuring that the safeguards constitutionally available to a detainee must be interpreted strictly or effectively in favour of protecting the detainee from the actions of the government.

The choice by the courts of Zambia to follow the Indian approach in the interpretation of the constitutional provisions under discussion was one of the reasons which prompted the government in 1974 to introduce an amendment to the Constitution,⁸⁷ the effect of which was to "transfer from the courts to the tribunal the questions of whether and, if so, how much compensation should be paid...." to detainees who proved that they had been detained unlawfully. This followed the many incidences in which the courts were awarding large sums of money to detainees who showed that their detention orders were defective from the procedural or technical point

of view. Mr. Silungwe, the Attorney-General, outlining the objects sought to be achieved through the Bill, explained to the House that:

"....Courts in Zambia have tended to follow decisions of Indian courts. In India if the executive makes a procedural mistake or one sheer technicality, they say that the executive must be penalised. This is the view that has been adopted in this country. Mr. Speaker, the position in Britain is different. In Britain.....they hold that any technicality or matters of pure procedure should not affect a detention or restriction. So, what we intend to do is to fall in line with the position as it obtains in Britain, which, I submit, is the correct one, so that we can exclude matters of pure procedural or technical mistake".⁸⁸

But, as has been explained earlier, the Bill did no more than what the Attorney-General stated as above, namely, that henceforth, should a court find that a detention or restriction is unlawful on a procedural or other technicality, it can nevertheless make an order for the release of the detainee or restrictee, but not for the payment of compensation by the state. But even with this effect, the Bill was severely criticised by a majority of the Members of Parliament who saw its effect "as an erosion of the rule of law and a deprivation of an individual's common law remedies and other common law causes of action".⁸⁹ It was in response to these criticisms that the government assured Parliament that the Bill would not attenuate the rights of detainees. "The position after this Bill has become law", explained the government through the Attorney-General, will be:

- "(a) the right of an individual to see and avail himself of all statutory remedies is unaffected;
- (b) the right of an individual detained or restricted by any person other than the President to sue and recover damages or obtain other remedies is also unaffected;
- (c) the right of a person detained or restricted by an order of the President to sue and recover damages or obtain other remedies remains unaffected in respect of any claim arising from:
 - i) physical or mental ill-treatment; and
 - ii) any error in the identity of the person restricted or detained;
- (d) the right of a detained or restricted person to challenge the legality of detention or restriction, for example, by an application for a declaration that the order of detention or restriction is unlawful, or by an habeas corpus application for the release of the applicant has not been taken away".⁹⁰

Quite clearly therefore, the amendment did not affect in any material way the established judicial attitude towards the enforcement of the rights of detainees and restrictees as provided for under the Constitution of Zambia. The courts in Zambia have continued to apply the Indian authorities in the interpretation of the constitutional provisions, although Zambian judges cannot possibly go as far as the Indian Supreme Court has gone in the enforcement of individual rights.

B. Judicial Enforcement of the other Rights under the Bill of Rights

In the first part of this chapter we indicated that apart from cases involving the provisions of the right to personal liberty, there are indeed very few Zambian cases which have been decided upon the remaining fundamental rights provisions. Indeed, the few cases

which are available have already been referred to in the last chapter in connection with the meaning which courts have placed on the qualifying phrase to most of the guaranteed rights and freedoms under the Bill of Rights, that is the expression "reasonably justifiable in a democratic society". Further, the famous Zambian case of Harry Nkumbula v. Attorney-General, which dealt with the freedom of association and assembly in connection with the introduction of a one-party state is discussed at length in a later chapter on the "One-party State and Human Rights". What this part of our investigation will concern itself with, therefore, is to examine how Zambian courts have gone about resolving the few fundamental rights cases that have come up before them, with specific reference to the extent of how their interpretations tend to favour or not favour the position of the individual in the dispute. We discuss this subject, therefore, under two sub-headings, viz., those aspects of constitutional interpretation which inherently favour the individual, and those which operate against him.

i) Aspects of constitutional interpretation favouring the position of an individual

Generally speaking, judicial interpretation of the fundamental rights provisions has tended to support not the position of the individual, but that of a governmental authority. This is so, even during normal times. During a declared emergency it would be understandable that strict interpretation of the provisions under the bill of rights would normally be in favour of the executive actions, since it is upon the executive that the task to preserve the security and safety of the nation devolves. In this connection it is to be observed that Lord Atkins' highly influential dictum in the English war

case of Liversidge v. Anderson⁹¹ has not influenced the approach of Zambian judges in the interpretation of human rights provisions. In this case Lord Atkins, in the course of his judgment, said that:

"I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive. Their function is to give words their natural meaning, not, perhaps, a wartime leaning towards liberty, but following the dictum of Pollock C.B., in Bowditch v. Balchin,⁹²... [that] 'In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute'. In this country, amid clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace...."

However, the decision of the majority in Liversidge v. Anderson (and, it might be added, those of other wartime cases which went before English courts)⁹³ indicate a reluctance on the part of the courts to intervene in favour of the rights of individuals against public authorities when there is in existence a declared national emergency.⁹⁴ However, these English cases involved the interpretation not of some provisions in a bill of rights, but of ordinary Acts of Parliament or, in certain cases, interpretation of subsidiary legislation. As Professor Read observes:

"The courts of England lack experience in applying constitutional texts and common law rules of statutory interpretation are therefore inadequate guides for the judicial construction of bills of rights".⁹⁵

The question of whether or not a constitution should be interpreted differently from an ordinary Act was dealt with in the Kenyan case of Republic v. El Manu,⁹⁶ which held, following an Indian authority,⁹⁷ that:

"....in one cardinal respect we are satisfied that a constitution is to be construed in the same way as any other legislative enactment, and that is, where the words used are precise and unambiguous they are to be construed in their ordinary and natural sense".⁹⁸

In the Zambian case of Patel v. Attorney-General,⁹⁹ which we have already referred to, the state submitted that a constitutional statute must not be given "a narrow and technical construction". The applicant, however, urged the court to follow the US case of Grau v. US,¹⁰⁰ which held that "the provisions of the Bill of Rights are to be broadly construed" so that they may be "protected against gradual encroachment that seeks to deprive them of their effectiveness". In other words, what was urged was that a bill of rights must be broadly construed in favour of the individual rather than in favour of the state.¹⁰¹ Magnus, J., made this important observation:

"....If, therefore, I had to depend entirely on extrensic construction for the meaning of the word 'law' in the relevant provisions, I would be inclined to follow that construction which favoured the applicant rather than that which favoured the state".

Further, His Lordship also held that Zambian judges were not bound by the decisions of other jurisdictions in the area of constitutional interpretations, although those decisions may in certain instances be of great assistance. Earlier on in the Kachasu case, Blagden, C.J., cited with approval the words of

Lord Radcliffe in Adegbenro v. Akintola¹⁰² in relation to the study of decisions on the interpretation of constitutions of other words as follows:

"....It is in the end the wording of the constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principle of other constitutions which are not explicitly incorporated in the formulas that have been chosen as the frame of this constitution".

However, courts in Zambia have upheld the principle enunciated by the Maltese case of Olivier v. Buttigieg,¹⁰³ that:

"Where fundamental rights and freedoms of the individual are considered a court should be cautious before accepting the view that some particular disregard of them is of minimal account".

In the Kachasu case, whose facts have been stated in the last chapter, Blagden, C.J., stated there may be a breach of a person's right to freedom of conscience if there is even a slight degree of hindrance in his enjoyment of freedom of conscience or religious thought as provided for in the constitution. His Lordship therefore held that the applicant in that case:

"Was hindered in the enjoyment of her freedom of conscience by being put under coercion through the application of ministerial regulations to sing the national anthem against her religious beliefs, and by being suspended from any government school because of her refusal, on religious grounds, to sing the national anthem or salute the national flag".

However, in the same case the court, while agreeing with the applicant's argument that a subjective ^{test} should be

used in determining whether one holds a religious opinion, nevertheless held that an objective ^{test} must be used in determining whether a ceremony or observance is religious in nature. The basis of the applicant's case rested on the provisions of an Act of Parliament, the Education Act, 1966, which provided that:

- "24. No pupil shall be refused admission to any school.....on the grounds of his..... religion.
- 25. If the parent of the pupil attending any school requests that he be excused from.....taking part in or attending any religious ceremony or observance, then, until the request is withdrawn, the pupil shall be excused therefrom accordingly".

Quite clearly under these provisions the applicant was entitled to be excused from participation or attendance at any religious ceremony or observance if her father did request so. The father of the applicant in fact had so requested in relation to the ceremonies of singing the national anthem and saluting the national flag. The court had therefore to decide whether the singing of the national anthem and/or the saluting of the national flag constituted religious ceremonies or observances. The applicant tried to urge the court that in accordance with her Watchtower faith, these activities were religious ceremonies and, since they were not directed at worshipping her God (but of worshipping secular symbols) she could not participate in them. Blagden, C.J., on the authority of the USA Supreme Court decisions,¹⁰⁴ held that an objective test must be applied in deciding whether the singing of the national anthem and the saluting of the national flag, can be regarded as religious

ceremonies or observances. The court further observed that since these ceremonies were instituted on the direction of the state, and not of any church or religious organization, and since the ceremonies were not invested with the trappings of religious worship, nor were they conducted by a priest in a place of religious worship, they could not be considered to be religious in character. Consequently, the court concluded that the applicant's claim that she was entitled to be excused from singing the national anthem and saluting the national flag on religious grounds pursuant to the provisions of the Education Act failed. In this case it will be seen that the court made what seems to be an important distinction between cases where a religious opinion is in question, and in cases where the dispute is over the nature of a ceremony or observance. In the former the court ruled that a subjective test must be applied since, "...it is impossible to test something so personal as an opinion in any other way". With respect to the latter case, an objective test must be used. This means that the subjective views of the person attending the ceremony is not to be taken into account however much he may believe and convince himself that he is participating in a religious activity. However, it is difficult to see how one can separate an opinion about the ceremony from the action taken as a result of holding that opinion. The applicant was suspended from school because she refused to sing the national anthem and to salute the national flag. Her refusal to participate in these activities directly arose from her conviction and belief (or of her opinion) that

the singing of the national anthem and the saluting of the national flag were religious ceremonies, or rather, that these amounted to worshipping a god other than her god. Therefore, her suspension from school was directly related to her holding the opinion that these ceremonies were of a religious character.

ii) Aspects of constitutional interpretation disadvantaging the position of an individual

Here it can almost be said that one of the obvious reasons why fundamental rights cases have invariably been decided in favour of the state as against the individuals concerned, is that it is the individual who carries the burden of proving that any of the guaranteed rights under the bill of rights has been contravened. The applicant in a fundamental rights case has not only to show that the challenged law, or anything done under its authority, is not required in any of the specified interests, but also that it is not "reasonably justifiable in a democratic society". The underlying reason for this is that the US Supreme Court, the Indian Supreme Court, and Zambian courts have upheld the principle that there is a presumption that the legislature has acted constitutionally and that the laws which it has passed are necessary and reasonable. Further, Zambian courts have also held that this presumption extends to rules made by a minister under statutory powers conferred on him by the legislature. In order to demonstrate how this principle of presumption operates, and how it particularly affects the position of an applicant, it is proposed to examine the provisions guaranteeing the freedom of conscience under the Zambian Bill of Rights and to discuss these in relation to the decision in the Kachasu case.

Section 21 deals specifically with the protection of the freedom of conscience. It is divided into five subsections.

Subsections (1) and (2) read as follows:

"(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.

(2) Except with his own consent (or, if he is a minor, the consent of his guardian) no person attending any place of education shall be required to receive religious instruction or take part in or attend any religious ceremony or observance if that instruction ceremony or observance relates to a religion other than his own"

We omit subsections (3) and (4) because they are of no relevance to the facts of the Kachasu case. There follows subsection (5), which is of the greatest importance here:

"(5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision which is reasonably required -

- (a) in the interests of defence, public safety, public order, public morality or public health; or
- (b) for the purpose of protecting the rights and freedoms of other person, including the right to observe and practise any religion without the unsolicited intervention of members of any other religion; and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society".

It will be recalled that the applicant in this case had been suspended from school and refused readmission because, being a Watchtower Witness, she refused to sing the national anthem and

to salute the national flag, as required by ministerial regulations. The applicant now argued that her suspension from school constituted "hindrances" as provided for under Section 21 of the Constitution reproduced above, and further that the ministerial regulations under which she was suspended were themselves in conflict with Section 21 of the Constitution, and in consequence invalid.

The onus of proof put on the applicant in this case assumed three dimensions, viz.,

- i) that she had to prove to the court that she was hindered in the enjoyment of her freedom of conscience, thought and religion;
- ii) that the regulations under which she was suspended were beyond the extent of what was reasonably required in the interests of defence, public safety or public order; and finally,
- iii) that any one of the hindrances she suffered to her enjoyment of freedom of conscience - the coercion, the suspension and the exclusion - went further than was reasonably justifiable in a democratic society.

We should hasten to point out here that the court had further ruled that:

"Where a court is called upon to adjudicate on the effect of a legislative measure, it is concerned only with the validity of the measure, its meaning and its application. It is not concerned with its wisdom or even its reasonableness".¹⁰⁵

Thus, although the applicant succeeded in discharging that she had been hindered in the enjoyment of her freedom of conscience, she still had to face burdens (ii) and (iii) as stated above. With respect to burden (ii), that is whether it was reasonably required in the interests of public safety, or for the purpose of protecting the rights and freedoms of others that children in government schools should be required to sing the national anthem and salute the national flag, the court observed that, "The criterion is reasonableness, not essentiality", and that "a requirement can be reasonable without being essential". It was therefore ruled, as we have seen earlier, that the applicant had not shown that the requirement was not reasonable since, "a regulation requiring children in government schools to sing the national anthem and to salute the national flag is reasonably required...." in the interests of national unity and national security, "and for the purpose of protecting the rights and freedoms of others". We have also indicated that with respect to burden (iii) stated above, the court holding that the applicant had not discharged the burden involved concluded that:

"A regulation requiring pupils in government schools to sing the national anthem and to salute the national flag, and a regulation giving the head of a school the power to suspend for failure to do so, are both reasonably justifiable in a democratic society".

It is interesting to contrast the Kachasu case with another important Zambian fundamental rights case of Patel v. Attorney-General,¹⁰⁶ in as far as the fixing of the burden of proof is

concerned. This case concerned the seizure, opening, and examination of the postal articles of the applicant by a Customs officer who suspected that these articles contained money which the applicant intended to send abroad illegally, and in breach of the foreign exchange regulations. In opening, examining and seizing the said postal articles the Customs officer had acted on the authority of the Exchange Control Regulations, 1965. The applicant challenged the validity of the Exchange Control Regulations under whose authority the Customs officer acted as contravening his right to privacy of property, his freedom of expression, and his right to the protection from deprivation of property as guaranteed respectively by Sections 19, 22 and 18 of the Constitution of Zambia (1964).

Taking first the applicant's claim that his right to protection from deprivation of property under Section 18 of the Constitution, the relevant parts of that Section are as follows:

"18(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say:

- (a) the taking of possession or acquisition is necessary or expedient -
 - (i) in the interests of defence, public safety, public order, public morality, public health, town and country planning or land settlement; or
 - (ii) in order to secure the development or utilisation of that, or other, property for a purpose beneficial to the community;

...."

The court stated that the relationship between a law restricting the fundamental rights and freedoms of the individual set out under the Bill of Rights, and the permitted restrictions thereunder, must be rational and proximate; and that exchange control is not sufficiently proximate to public safety to warrant the Exchange Control Regulations, 1965, being adopted "in the interests of.....public safety". However, the court held that the Exchange Control Regulations, 1965, are sufficiently proximate to "the development or utilisation of property for a purpose beneficial to the community" to justify such regulations being adopted for such purpose, and the taking of possession and search of a postal article pursuant to the authority conferred on Customs officers by the Exchange Control Regulations is "expedient" and "reasonably required" for a scheme of exchange control designed for such purpose. However, Magnus, J., in this case refused to follow the ruling of Blagden, C.J., in the Kachasu case, as on whom the burden of establishing whether a law is "necessary or expedient" or "reasonably required". The "test", Magnus, J., said, as to whether an Act is "necessary or expedient" within the meaning of Section 18(1)(a) or "reasonably required" within the meaning of Sections 19(2) and 22(2), is an objective one, and the burden of establishing whether an Act is "necessary or expedient" or "reasonably required", rests not upon the individual, but upon the state. The reason given for this view was that the onus of proving that the legislation concerned comes within the permitted derogations must rest on the state rather than on the individual was that "....such matters are within the peculiar knowledge of the state".

The decision in the Kachasu case regarding the presumption of constitutional validity in favour of the legislation, has also been criticized as constituting an instance of "judicial self-imposed restraint or judicial passivism".¹⁰⁷ The criticism was based on the commentator's observation that:

"Since 1938, the US Supreme Court has held that the presumption of constitutional validity of a statute is not applicable where a statute appears prima facie to invade the fundamental rights guaranteed by the First Amendment.... In such a case, the presumption is rather to the contrary".¹⁰⁸

There is no doubt that this doctrine can be found in the US, Indian and Nigerian cases,¹⁰⁹ and that the Zambian decision was based on the Nigerian precedents.¹¹⁰ It was further asserted that the presumption in favour of constitutionality "...is self-imposed in as much as neither Constitution [i.e. of USA or of India] has laid down any rule of presumption in this respect either way". But surely this can only be true with reference to the constitutions of the USA and of India, and not those of Commonwealth African countries, such as Zambia. For example, under the Zambian Constitution, the wording of many of the provisos to the guaranteed rights and freedoms, i.e., "except so far as that provision.....is shown not to be reasonably justifiable in a democratic society", clearly means that the applicant must show that it is not reasonably justifiable. But the important aspect of the decision in the Patel Currency case in this context is the rejection of the view of Blagden, C.J., in the Kachasu case that the individual must prove both that the impugned legislation is not reasonably required in any of the specified interests, and

further that that legislation is not reasonably justifiable in a democratic society. The Patel Currency case lightened the burden on the applicant by holding that while it is his burden to show that a particular legislation goes further than is reasonably justifiable in a democratic society, the state carries the burden to prove that that legislation comes within the permitted derogations, that is, that it is "reasonably required" in any of the specified interests.

The Patel Currency case further ruled that the word "correspondence" implies a communication of ideas; and that a series of signs and symbols unaccompanied by an explanation of what they denote is not a communication of ideas and, hence, not "correspondence" within the meaning of Section 22 of the Constitution guaranteeing the freedom of expression. The court further held that a search without a warrant of a postal packet is reasonably justifiable in a democratic society when the Customs officer making the search is duly authorized, has a "reasonable suspicion that was objective and not subjective", formed his suspicion in respect of a particular postal packet before he entered the post office, and had satisfied someone of the grounds of his suspicion. However, the court warned that a Customs officer who opens a postal packet without first obtaining a search warrant does so at his own risk; and if the packet turns out to be "correspondence" within the meaning of Section 22 guaranteeing the freedom of expression, there will have been a breach of the sender's rights under Section 22, which will be the personal responsibility of the Customs officer.

In conclusion, it may be stated that the way most of the rights and freedoms are formulated under the Zambian Bill of Rights (and indeed, under many of the African constitutions), coupled with a somewhat passive attitude of the judiciary towards their enforcement constitute at least one fundamental reason explaining why many of the human rights cases have ended up in favour of the government. However, the most controversial provisions under the Zambian Bill of Rights have been those guaranteeing property rights. It is in this area of the bills of rights that virtually all African governments have come to concern themselves because property rights guarantees were looked upon as standing in the way of social and economic reforms, which those governments had set themselves to implement after independence. The subject of the relationship between the constitutional protection of property rights and the needs of economic development in the context of African circumstances is an important one, and would therefore require a separate chapter of its own. In the next chapter we take up this subject.

NOTES

1. See for example, S.28(2) or S.29(2) of the Republican Constitution (1964) and the One-Party Constitution (1972) of Zambia, respectively.
2. See the previous Chapter (5) in which this subject is discussed somewhat extensively.
3. See Section 29(1) of the Constitution of the Republic of Zambia (1964).
4. cf. previous chapter.
5. Cap. 108 of the Laws of Zambia.
6. Cap. 106 of the Laws of Zambia.
7. See for example, S.3(1) and S.3(2) of the Emergency Powers Act, and the Prevention of Public Security Act, ibid., respectively.
8. Ibid.
9. Section 3(1) of the Preservation of Public Security Act, for example, provides that that Act shall have effect during any period when a declaration made under Paragraph (b) of Subsection (1) of Section 29 of the Constitution has effect. Now this section in the Constitution dealt with a declaration of "threatened" emergencies. The Emergency Powers Act has effect only when "a proclamation under the Constitution declaring that a state of public emergency exists". See S.2 of the Act.
10. Malaya Law Review, Vol.s8-9 (1966-7), p.283. See also the Privy Council decision (1970), AC 379.
11. (1962) 1 All NLR 324, 413 at p.336.
12. (1962) 1 All NLR 431 at p.348.
13. Jain, Indian Constitutional Law (Bombay, Tripathi, 1970), p.459.
14. Per Baron, J.P., in Kapwepwe and Kaenga v. Attorney-General for Zambia, op.cit.
15. "Development and State Power: Speech Inaugurating the University College, Dar-es-Salaam", reprinted in Thomas Frank, Comparative Constitutional Process (1968), p.231, (and in J.K. Nyerere, Freedom and Unity (OUP, Dar-es-Salaam, 1967), p.312).
16. S.26(1) of the 1964 Constitution of Zambia.

17. S.26 of the One-Party Constitution (1973), author's own emphasis.
18. S. Kapwepwe and E. Kaenga, v. Attorney-General for Zambia, ZLR (1972), 248.
19. Ibid., p.263.
20. (1881) 6 QBA, S.76 at p.463.
21. Reg. 18(4) of the Preservation of Public Security (Detained Persons) Regs. S.1, No.412 of 1964, as amended.
22. Reg. 18(3), ibid.
23. Reg. 26(1), ibid.
24. Reg. 21(1), ibid.
25. Reg. 21(4)(5)(6), ibid.
26. Reg. 33(7) of the Preservation of Public Security Regulations, ibid.
27. Constitution (Amendment) (No.5) of 1969.
28. This Act also affected property rights; declarations of emergency; freedom of movement, and the judiciary. See also our Chapter 5.
29. See Section 7 of the 1969 Constitutional amendment, op.cit.
30. 1972 Court of Appeal for Zambia, No.16, (unreported).
31. The point is emphasized by B. Nwabueze, Presidentialism in Commonwealth Africa, op.cit.
32. The Constitution of Zambia (Amendment) Bill, No.18 of 1974. This Amendment is also discussed later on in Chapter 9.
33. See Section 4(b), ibid.
34. Daily Parliamentary Debates of Wednesday, 31 July 1974, No.36, see Chisembele, M.P., cols.401-406: Government Printer, Lusaka, 1974.
35. See Section 4(b) of the Constitutional amendment, op.cit.
36. See Chapter 5.
37. (1970) SJZ, No.28 (unreported).
38. (1881) 6 QBD, 376.

39. Quoted by Magnus, J., at p.182.
40. Per Magnus, J., at p.185.
41. Basu, Commentary on the Constitution of India, 5th edition, Vol.11, op.cit., at p.104.
42. Per Magnus, J., p.186 (SJZ No.28 of 1970).
43. Ibid., p.188.
44. In Attorney-General v. Chipango (1971) SJZ No.12.
45. Re. Alice Lenshina Mulenge (1973), ZLR, 243.
46. See Basu's Commentary on the Constitution of India, op.cit., pp.102-32.
47. (1953) SCA 708: (1952-54) GC 317: A. 1953 SC 318.
48. Quoted in Basu's Commentary on the Constitution of India, op.cit.
49. Per Doyle, C.J., emphasis supplied.
50. (1966) EALR 514.
51. Ibid., at p.546.
52. Op.cit., at p.66.
53. (1973) ZLR 133.
54. Per Cullinan, J., at p.139, ibid.
55. (1941) 3 All ER 388.
56. Op.cit.
57. Quoted in Attorney-General v. Chipango, op.cit., at p.60 (SJZ, 1971, No.12).
58. Section 26(2)(a) of the Constitution of Zambia.
59. (1972) ZLR 248.
60. 1967 10 WIR 435.
61. Per Lewis, C.J., ibid., at p.452.
62. AIR 1951, SC 157.
63. AIR 46, 1959, SC 1335.
64. Per Kania, C.J., ibid.

65. Ibid.
66. Per Baron, J.P., in Simon Kapwepwe and Kaenga v. Attorney-General, op.cit., p.262.
67. Ibid.
68. Ibid.
69. Per Doyle, C.J., in Kapwepwe and Kaenga v. Attorney-General, op.cit., at p.260.
70. Ibid.
71. Basu, Commentary on the Constitution of India, op.cit. p.133. See also the Indian cases of Dwarka v. States of J. & K. (1956), SCR 948, and Ram Krishan v. State of Delhi (1953) SCR 708.
72. (1976) ^{ZLR} 139.
73. (1975) ^{ZLR} 69.
74. AIR 1951 SC 157.
75. Reg. 33(6).
76. Reg. 33(1).
77. Per Lewis, C.J., in Herbert v. Phillips and Sealey, supra., emphasis supplied.
78. Per Baron, J.P., in Kapwepwe and Kaenga case, op.cit.
79. (1950) SCJ 174 (192), p.263.
80. Cited by Cullinan, J., in the Zambian case of Re. Henning Buitendag (1974), ZLR 156, discussed below.
81. (1974) ZLR 156.
82. See Dharmdas v. District Magistrate, A.1960 Gugajet 43 (47).
83. See Raman Lal v. Commissioner of Police, A.1952, Cal.26(30); Maledath v. Commissioner of Police, A.1950 Bom.202; Baboo Ram v. State, A.1951 All 838 (42).
84. Rambhuj v. Punjab State, A.1954; also cited in Re. Henning Buitendag case, op.cit.
85. Jagannath v. State of Bihar, A.1952, Pat.185 (192).

86. At p.160, op.cit.
87. Op.cit.
88. Official Daily Parliamentary Debates, Wednesday, 31 July 1974, No.36F, Col.396.
89. Hon. A. ~~Silungwe~~ Col.394, ibid.
90. Col.398-9, ibid.
91. (1942) A.C. 206.
92. (1850) 1 Ex. 378.
93. See, for example, Greene v. The Secretary of State for Home Affairs (1943) A.C. 284; R. v. Halliday (1917), A.C. 260.
94. This subject is discussed fully by J.A.G. Griffith, The Politics of the Judiciary (Fontana, 1977), Chapter 4.
95. J. Read, Bills of Rights in the Third World, at p.38.
96. (1969) E.A. 357. Also cited and discussed by Read, op.cit., p.38-51.
97. Keshava Menon v. State of Bombay (1951), S.C.R. 228.
98. Quotation taken from J. Read's article, op.cit., at p.38.
99. (1968) Z.L.R. 99.
100. Gray v. U.S., 77 Law Ed. 212.
101. See Sgro v. U.S. 77 Law Ed. 260.
102. (1963) A.C. 614.
103. (1967) 1 A.C. 115.
104. He particularly relied on Sheldon v. Fannin, 221, T.Supp. 766 (1963), Donald v. Board of Education v. Barnette, 319 US. 624 (1943) - all of which adopted an objective test in regard to the singing of the national anthem.
105. Per Blagden C.J., at p.165, emphasis supplied.
106. (1968) Z.L.R. 99.
107. Mohammed R. Zafer, "Kachasu Case", ZIJ. Vol.1, No.1 (1969) pp.44-48, at p.48.
108. Ibid.
109. See commentaries by Read, "Bills of Rights in the Third World", op.cit., p.42-3.
110. See, for example, Charand v. Cheranci, discussed in (1963) J.A.L., at pp.159-60; also Arzika v. Governor, Northern Region (1961) A.N.L.R. 379, per Pate, J., at p.382.

CHAPTER 7

THE CONSTITUTIONAL PROTECTION OF PROPERTY RIGHTS AND THE NEEDS OF ECONOMIC DEVELOPMENT IN AN EMERGENT STATE: THE ZAMBIAN EXPERIENCE¹

".....the Constitutional protection of individual rights might prove to be an embarrassing obstruction in the way of social and economic projects....."²

In the present chapter we examine the extent to which the protection of property rights in the Commonwealth African Constitutions proves the charge that these provisions have had the undesirable effect of limiting the power of African governments to initiate development programmes along socialist lines. In the event of the existence of those restrictive provisions in the bill of rights, we further examine the measures taken by the African governments to alter the character of the bills of rights after independence, so that the constitution in question was geared to be more responsive to efforts intended to induce socio-economic transformation that all new nations desperately need.

However, before coming to deal with the central theme of this chapter as explained above, it is suggested saying something brief about, firstly, the nature of the relationship between human rights and the ideals of socio-economic security, and secondly, about the origins and bases of the phenomenon of "economic nationalism" in emergent states. Finally, an account of some relevant facts about Zambia's economic background is undertaken. The ground would then have been cleared from which to discuss the theme of this part of the thesis.

A. Human Rights and the Needs of Socio-economic Development

Among the most urgent priorities in the newly independent countries of Africa, no doubt economic development and national security can perhaps be rated to be in the forefront. It is therefore not surprising that the nationalist governments which took over from the colonial governments saw as their major post-independence task the need to make improvements in the socio-economic well-being of their respective peoples and countries. Thus the whole government machinery was harnessed, not just to the creation of appropriate democratic institutions necessary to uphold the dignity of man as an individual, but also for the creation of the social, economic, educational and cultural conditions which are regarded as essential to the full development of his personality.

The view that effective exercise of the rights of the individual includes improvements in the quality of his economic, social, educational and cultural life was expressly recognized both at the International Congress of Jurists in New Delhi in January 1959, and at the African Conference on the "Rule of Law" held in Lagos, Nigeria, two years later. The Declaration of Delhi, which sums up the conclusions reached by the Congress, states, inter alia:

"This International Congress of Jurists....recognizes that the Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which its legitimate aspiration and dignity may be realized...."³

Here it is not intended to denigrate the importance to the individual of civil or political rights (e.g. freedom of speech, freedom of association, etc.) which every free and democratic

society must aspire to uphold. But it is unlikely that a hungry, homeless, poverty-stricken man would be excited about his freedoms; an illiterate man, for example, will certainly not effectively make use of his freedom of expression. He needs something more than that. However, it is possible that the proposition to the effect that material well-being is more important to an individual's personality and dignity may be over-stated. For example, it has been observed that:

"It is arguable that personal liberty.....is more intrinsically bound up with the worthiness of the individual's existence than food and clothing, housing, education, etc.The truth is that both liberty and material comfort are both necessary for a happy life. There should be no question of having one and not the other. Both must need co-exist...."⁴

Even the above view at least recognizes the fact that material comfort has become to be an equally important component of the individual's life. This is a very relevant point in conditions of the Third World, where a greater number of the human race suffer from abject poverty, disease, and from ignorance. Efforts to improve the quality of the life of the individual in these areas, therefore, must start with the need to combat the three ills of ignorance, disease and poverty. A new nation must aim at securing to the individual the minimum basic requirements for human existence - food, clothing, shelter, education, medical and sanitary services, etc. The practical fulfilment or achievement of these objectives is possible only under a socialist pattern of social and economic organisation of these societies. The identifying characteristics of a socialist economic system are chiefly these:

- a) a vast increase in the range and detail of government regulation of privately-owned economic enterprises;
- b) the direct furnishing of services by government to individual members of the national community; and
(this is important to the instant inquiry)
- c) increasing government ownership and operation of industries and business which, at an earlier time, were, or would have been operated for profit by individuals or private companies, mostly those having connections with the colonial power.⁵

This last point necessarily implies that effective realization of socialist ends, at least in emergent states, would involve buying out existing private and foreign-owned businesses through the mechanisms of "nationalizations" or "partial take-overs". Yet active state intervention in the national economy involving forms of control and nationalization is obviously fraught with a strong likelihood of conflict with individual rights - especially the protection of property rights in the national constitution. Invariably, in all the Commonwealth African bills of rights, private property rights were, at the time of independence, entrenched so as to make it difficult (indeed almost impossible) for a new state to acquire private businesses compulsorily for the proper and bona fide utilization and development of the same for the benefit of the whole community. Now, it cannot be disputed that in the conflict between nationalization or state take-over with individual property rights, the interests of economic development must prevail - of course subject to certain safeguards.

B. Basis and Origins of Economic "Nationalism" in Emergent States

Practically all leaders of emergent states assert that they have opted for some kind of "socialism" as an appropriate system through which economic development can successfully be attained. This naturally raises a problem in these areas, since the former colonial power before departure had ensured that the capitalist economic system should continue to operate. For instance, it is not surprising that at independence the inherited economic institutions continued, as before, to operate on capitalist lines and only interested in generating large profits for transfer of the same to their overseas shareholders. These institutions were only seeking to maintain the status quo. It is clear, therefore, that a new nation anxious to pursue a socialist approach to development is first of all faced with the problem of ^{restructuring,} or completely removing economic institutions that grew up under the auspices of laissez-faire capitalism. As one African intellectual has pointed out:

"The problem with the economic development of an African country such as Zambia is not how to improve within the system; for not much benefit could be derived from such improvements in an under-developed economy. The problem is to establish a new society, which means first of all, the creation of the basis of this society, that is, its economic, political and technological infrastructure. Economic development encompasses all this, and more".⁶

With this background to the problems of African economic development, it is easy to see why it is that African leaders have always looked upon political independence as incomplete, although a necessary and indispensable prerequisite to the attainment of economic independence and social equality. In this regard, the late President Jomo Kenyatta of Kenya expressed what seems to be

a representative view of all African leaders in rather eloquent language when he stated that:

"Our achievement of independence, for which we have struggled for so long, will not be an end in itself. It will give us the opportunity to work unfettered for the creation of a democratic African socialist Kenya. Democratic because we believe that only in a free society can each individual develop his talents most fully to serve his fellow citizens. African because our nation must grow organically from what is indigenous.....socialist because political freedom and equality are not enough; our people have the right to be free from economic exploitation and social inequality".⁷

Implicit in the African attitude, as expressed above, is that Africans consider "colonialism" to comprise many components. Conspicuous among these are political subordination, economic subordination, social and cultural subordination. What may not be so apparent is that African leaders and national movements are, or were, in revolt against economic domination in exactly the same way as they are or were in revolt against political domination (and indeed they are also in revolt against social institutions and values that colonialism fostered). Lord Brockway has expressed the nature of the African resentment in the above matters as follows:

"Africans resent alien economic control as much as they resent alien political control. They are frustrated by alien ownership of mines, plantations and factories, and by the racial inequality of alien managements, alien skilled crafts, alien workers paid more than African workers on similar jobs..... They resent the way in which white settlers and financial corporations have taken possession of their best land in many parts of Africa. They regard themselves as living under an economic occupation and identify their economic masters with the colonialism against which they are in revolt".⁸

In the context of the above remarks, it is clear that African leaders have always felt a sense of commitment to the

emancipation of their respective countries from the economic domination of the former colonial interests. They regard it as an extension of political nationalism to free their countries from foreign control of their economies, and see socialism as the most effective weapon with which to achieve this emancipation. This is why it is said with respect to an African leader that, "his nationalism leads him instinctively to socialism". He is obsessed with the idea that in order effectively to induce rapid economic development, the dominant foreign-owned industries ought to be subordinated to public control or ownership. Now, the practical implication of adopting a socialist mode of economic development means that the basic means of production - "the commanding heights in the economy", as President Nyerere likes to call them - have to be bought out. And in a new, emerging state where there is lack of private capital, it is only the state that can find the enormous sums of money and organizational skill involved in the whole exercise of take-overs.

There is one relevant point that needs to be pursued further here, and this relates to the importance the new nations attach to the role of the state in national development. According to Marxists, the state must wither away after the introduction of communism, a higher phase of socialism. This assertion was based on the postulate that the bourgeois state was a tool for the establishment of "democracy for a small minority, democracy for the wealthy".⁹ The Marxists therefore take up the position that this apparatus, this bourgeois state, should be destroyed and

replaced by another, a proletarian rule.¹⁰ With the end of an economy based on bourgeois capitalism and class conflict, the state would become superfluous, and both the state and its product of coercive law would become unnecessary and would "wither away". In the political and economic context of the new nations this is not the way the problem is looked upon. The state appeared as a result of successful struggle for national liberation. The state came together with independence. The state is viewed as the most effective means of preserving political and economic independence, of liberating the country from foreign tutorship.

Here, therefore, we cannot avoid reaching the conclusion that the African conception of the state differs considerably from the Marxist conceptions in terms of the definition and the functions of the state, and the question of the withering away of the class struggle within the framework of the state. So it is that the state is presumed, and is under a duty, to be the chief organ for the purposes of ensuring that the country's wealth and resources are exploited for the maximum benefit of the people instead of leaving the task to the mysteries of the open market. Professor Ann Seidman has clearly stated the case for the crucial importance of the role of the state in the economic development of the emergent nations, when she writes that:

"It is evident.....that to leave critical investment decisions entirely to private enterprise motivated by the search for profits was to leave the economy essentially as it was inherited from the colonial era: a dual economy hinged through the export enclave to the uncertainties of the world market. If the structure of the economy was to become more internally integrated, geared to increasing productivity to raise the levels of living of the entire population, it was necessary for the state to intervene to ensure the implementation of a meaningful development strategy".¹¹

From what is stated in the preceding paragraphs it is beyond doubt that the evidence available supports the proposition that one of the true motivations of the socialist option in the newly-liberated states of Africa is nationalistic, i.e., an extension of political control. In the second place, there is also a genuine desire on the part of African leaders to terminate alien economic domination, and to safeguard national economic interest. State participation in the economy, however, which socialism envisages, involves the nationalization of assets belonging to foreign nationals. However, the problem in the realization of economic development through the mechanism of nationalization was that the independence constitution written for Zambia, for example, "completely" prohibited confiscation of property by the new African government.

C. The Extent to which the Protection of Property Rights in Commonwealth African Bills of Rights "impeded" Economic Development

In the preceding paragraphs we have stated that a bill of rights can, depending upon the nature of the protection, entrench private property rights without regard to the needs of economic development. It becomes relevant, therefore, to examine the extent to which the protection of property rights in the Commonwealth constitutions supports that charge.

To start with, it should be noticed that compulsory acquisition of private property in all these bills of rights is permitted, but within a relatively narrow range. There are at least two discernible approaches that Commonwealth bills of rights exhibit; the first one is that represented by Uganda (1962), Kenya (1963), and Sierra Leone (1961). These bills of rights provide that no property of any description shall be compulsorily taken possession of, except where the taking possession of, or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such a manner as to promote the public benefit; and further that it has to be shown that the necessity is such as to afford reasonable justification for the hardship that may result to any person having an interest in the property acquired.¹² The second approach is represented by Malawi (before 1966), Zambia (before 1969), and Botswana. In this category of the bills of rights, the government can justify the acquisition on the ground that it is either

"necessary" or simply that it is "expedient" in any of the specified interests. Once again, it is worthwhile to restate the proposition that the above provisions necessarily imply that compulsory acquisition cannot be embarked upon unless that acquisition can be demonstrated to be "necessary" or expedient for one of the specified purposes. In other words, the necessity or expediency of the acquisition is a condition precedent to the constitutionality of compulsory acquisition. But what do the principal expressions, "necessary" and "expedient" mean in the context? How do the two conditions compare in terms of scope within which they allow compulsory acquisition? In the *Zambian case of Jasbhai Patel v. Attorney-General*,¹³ Justice Magnus, as he then was, defined the expression "expedient" as something "conducive to the purpose" in hand, or "suitable to the circumstances of the case"; and it is, therefore, far short of what is "necessary" or what is "reasonably required". The Judge then held that the seizure, under statutory powers, of postal packets containing currency notes which were illegally exported out of the country, was expedient for a scheme of exchange control designed to secure the development of the nation's financial resources for a purpose beneficial to the community.¹⁴

The second point to take notice of is the fact that confiscation or compulsory acquisition of property without compensation, is virtually prohibited in the Commonwealth African bills of rights. However, the only limited scope within which confiscation is given recognition really amounts to no

confiscation at all properly or strictly so-called. Indeed, a closer examination of the circumstances in which a constitutional authorization of confiscation is given reveals that the act of deprivation of the property does not arise from a purely positive act of confiscation, "but from the failure of the owner to assert his right in time", it is, the Judicial Committee of the Privy Council has rightly observed, "thanks to his own inaction".¹⁵ It is quite plain that this is the correct inference about "confiscation" in Commonwealth African bills of rights where recognition of it, for example, arises in situations where property is taken:

- i) in satisfaction of a tax, rate or due;
- ii) in execution of a judgment;
- iii) by way of penalty for breach of some law;
- iv) as an incident of a lease, mortgage or charge;
- v) in circumstances where it is reasonably necessary to do so because the property is in a dangerous state or injurious to the health of human beings, animals or plants;
- vi) in consequence of any law with respect to the limitation of actions;
- vii) for so long as may be necessary for the purposes of any examination, investigation, trial or inquiry or, in the case of land, for the purpose of the carrying out thereon of work of soil conservation or other natural resources or work relating to agricultural

development or improvement, being work relating to such development or improvement that the owner or occupier of the land has been required, and has without reasonable excuses refused or failed to carry out.¹⁶

The bills of rights, then, add that in each one of these situations the law authorizing the deprivation of property as well as any action taken thereunder must be reasonably justifiable in a democratic society. None of the situations mentioned above in which confiscation is authorized can be said to amount to a direct conferment of authority on the part of the government to deprive the owner of his property. In other words, confiscation, as a "positive" act, is absolutely prohibited in the Commonwealth African bills of rights.

As it has been asserted elsewhere in this inquiry, it is proper that a bill of rights should have a moral basis and should seek to uphold decent moral ends in the society in which it operates. By their very nature, confiscatory acts are associated with discriminatory measures aimed at certain individuals or groups of individuals and take the form of a penal measure. They are therefore in direct conflict with all accepted codes of morality. To compel certain individuals in a community, or certain categories of individuals, to give up their property for the general welfare of the larger community without compensation is a very unfair situation. Property is, generally speaking, a result of legitimate labour or arduous venture, and the compensation paid to the owners of the property taken represents precisely the corresponding contributions

made by the rest of the community in order to equalize the financial incidence of this taking of private property. Thus the cost of acquisition in an ordinary case should be borne by the society as a whole, and so the owner of the property is compensated for the special loss he suffers. But it is submitted that no morality is violated in a situation where the owner of the property has been at fault as in a case where he obtained the property through force, corruption, threats or deceit or through any other immoral methods. In these circumstances, confiscation may, in fact, be the restoration to the people of property illegally taken away from them.

It is morally objectionable that any individual or company should claim ownership of mineral rights in perpetuity as did Cecil Rhodes and the British South African Company with respect to the rich minerals of Northern Rhodesia (now Zambia). What is even more uncompromisingly objectionable is that an alien individual or foreign company should claim to own the mineral wealth of any country in perpetuity. In fact, if a strict view is taken about the circumstances in which the mineral rights of Northern Rhodesia were acquired and the extraordinary profits made over the years at the expense of the people, the nationalization of the mining industry in 1969 could have been carried out without material compensation, since the investors would be deemed to have more than
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compensated themselves. It is obvious that Zambia's philosophy of humanism and the desire to retain the services of the skilled foreign miners contributed to the respect for rights illegally acquired.

It is plain that the British Government's intention at the time of writing the independence constitution of Zambia was to entrench the mineral rights of the British South African company by totally prohibiting "positive" confiscation of property. Lord Brockway has in fact stated the case rightly when he writes that:

"The financiers and capitalists of Europe and America would care little if they were to lose all their possessions on the continent of Africa so long as they retained their mineral wealth. Capitalism in Africa is the ownership of its minerals. One cannot think of an Africa which is socialist without the transference of its mineral resources and wealth to the people".¹⁸

The prohibition of expropriation without compensation in the Zambian independence constitution was a very serious legal hurdle to the utilization of the mineral resources for the development of the country for the benefit of the community as a whole. It is necessary to pursue this matter a little further, and to show the seriousness of the aspect of the constitutional provision under reference.

D. The Constitutional Prohibition of Compulsory Acquisition without Compensation and its Impact on Economic Development in Zambia

When one talks about "economic independence", this should not be understood to be referring to or confined to Africa, or even to the under-developed countries only. Economic independence is a universal question. It is said, for example, that such rich and industrialized countries as France and Canada have been concerned at the large-scale American investment without any local control on the same. With respect to Canada, it is estimated that more than 50 per cent of the country's entire production economy is American-owned. 25 per cent of Canada's fuel companies (oil and coal) are American; 60 per cent of Canada's gas industry, 62 per cent of her mining and smelting, 25 per cent of her railways, 13 per cent of her

utilities are in American hands.¹⁹ This is what the former

Progressive Conservative Party leader, John Diefenbaker, once said about this state of affairs:

"Canada's economy is altogether too vulnerable to sudden changes in the trading policy of Washington. Canadians do not wish to have their economic, any more than political, affairs determined outside Canada. Moreover, we have become dependent on the USA, which now largely controls our iron, petroleum, copper and the like".²⁰

It is self-evident that the inability of a state to control any aspect of its national activity leads to resentment and frustration. But the problem is, however, more acute in Africa, in the states that have recently attained political independence. Zambia, in particular, affords a very revealing example of economic dependence than any other country within Commonwealth Africa. At Independence in 1964, virtually the whole of the manufacturing industry, mining and the financial sector and a large part of other service sectors, including wholesale/retail, were in the hands of foreigners. And because of Zambia's long economic association with the south, most of the businesses in the country continued to be dominated and controlled from Salisbury and South Africa.

But by far the most serious aspect of Zambia's economic dependence is the extraordinary dominance of copper in the economy. Copper forms the backbone of the country's economy, as is indicated below:²¹

	GDP	GNP	EXPORTS	REVENUE	EMPLOYMENT
Zambia	40	34	93	68	15
Congo (Kinshasa)	18	23	51	45	2
Chile	4	3	65	14	3
Peru	2	1.5	18	12	1

None of the other three copper-producing countries depend so extensively on the commodity for their GDP, GNP, Exports, Revenue or Employment.

The neighbouring Congo (Kinshasa) in fact does so almost to the extent of half of Zambia's dependence. It is essentially because of this problem - that is, the country's extraordinary dependence on copper - coupled with the Zambian government's inability to influence its price and to direct its proper development for the benefit of the Zambian people as a whole, that there was a growing impatience that the copper industry should be nationalized. But government could do nothing in the meantime, since it had no legal power to acquire property without compensation. It is clear that the British plan to prohibit expropriation of property without compensation in the Zambian independence constitution was still persistently hindering the utilization of the country's mineral resources for the development of Zambia.

Apart from ownership of the title to the minerals, the BSA Company also had the power to decide who should prospect and where. A prospector had to obtain the licence from the BSA Company to operate if and when he desires to start mining operations. If mining was successful, he had to pay royalties on production to the BSA Company. Indeed, as far as mining was concerned, the BSA Company was the government of Zambia. The rich copper ores of the country were mined by two company groups: the Rhodesian Anglo-American Limited, and the Rhodesian Selection Trust Limited (known as Rhoanglo and RST, respectively). Exclusive rights had been given and held by these companies ever since the 1920's to prospect,

explore and mine in certain areas which covered 70 per cent of the country's surface. The mining rights granted by the chartered company to the two mining groups included those granted in perpetuity under special grants. "It seemed morally indefensible", one commentator exclaimed, "that these rights should be protected against expropriation except on terms of payment of compensation".²² It was this state of affairs that the 1969 Constitutional Amendment was intended to correct, namely, to permit acquisition of the rights granted in perpetuity by the state without compensation. President Kaunda at Mulugushi directly attacked the Constitution. He said:

"Perhaps this is an appropriate time for me to announce that Government has accepted in principle the need to amend that part of the Constitution which relates to the compulsory acquisition of property. As humanists we are dedicated to upholding the protection of fundamental rights and the freedom of the individual. However, property rights must be subject to the common good and to the general interests of the community. The existing Section 18 of the Constitution must be examined and replaced by more realistic provisions".²³

The Constitutional Amendment of 1969,²⁴ which was passed to give effect to this new government policy, greatly extended the permitted scope of confiscation beyond that stipulated in the Independence Constitution. The important new areas in which confiscation is now authorized include: a law which vest in the President rights of ownership, searching for, mining and disposal of minerals, and which empowers him to revoke grants of prospecting, exploration or mining licences upon failure to comply with the conditions of such licences; in addition, confiscation is permitted by any law relating to (i) exchange control: (ii) abandoned, unoccupied, unutilized or undeveloped land; (iii) absent or non-resident owners; (iv) the acquisition of shares or a class of shares, in a body corporate on terms agreed

by the holders of not less than nine-tenths in value of those shares or that class thereof; (v) the forfeiture or confiscation of the property of a person who has left Zambia for the purpose or apparent purpose, of defeating the ends of justice; (vi) the administration or disposition of property by the President in implementation of comprehensive land policy or of a policy designed to ensure that the statute law, the common law and the doctrines of equity relating to or affecting the interests in property enjoyed by chiefs shall apply with substantial uniformity throughout Zambia.²⁵

For the purpose of implementing the amendment, two pieces of legislation were enacted. These were the Lands Acquisition Act 1970,²⁶ and the Mines and Minerals Act 1969,²⁷ (effective on January 1, 1970).

The Land Acquisition Act empowered the President compulsorily to acquire any property of any description whenever he is of the opinion that it is desirable or expedient in the interests of the Republic so to do.²⁸ This Act actually replaced the colonial legislation - the Public Lands Acquisition Ordinance.²⁹ One discernible feature of the colonial legislation was that government policy relating to acquisition of property could be frustrated by the complicated definition of "public purpose". For any acquisition of property, the government had to show that it is justified on the ground that the particular property was needed for a public purpose. The new Act avoids this by vesting a discretionary power on the President who has to be subjectively satisfied that the

acquisition is in the interests of the Republic.³⁰ The advantage of the new legislation is that the owner of the property acquired will find it extremely difficult to defeat government action in a court of law merely by arguing that the acquisition was not in the interest of the Republic. There is a considerable number of judicial decisions to the effect that the exercise of a discretionary power cannot be challenged unless it can be shown that the person vested with the power acted in bad faith or from improper motives or on extraneous consideration or under a view of the facts or the law which could not reasonably be entertained.³¹

The Land Acquisition Act 1970, also provides that no compensation is payable where an undeveloped land has been acquired. Also no compensation is paid in respect of unutilized land of an absentee owner. The only exception in this respect is that compensation is payable for any unexhausted improvements on unutilized land belonging to a resident in Zambia. But if the land is unutilized land belonging to an absent owner, i.e., a person not ordinarily resident in Zambia, no compensation is payable. Unexhausted improvement is defined in the Act as any quality permanently attached to the land directly resulting from the expenditure of capital or labour and increasing the productive capacity, utility or amenity thereof.³² The justification for the expropriation of unutilized land belonging to absentee or non-resident owner was explained by the then Minister of Land and Natural Resources, Mr. Solomon Kalulu, when he was presenting the Bill in the National Assembly:

".....Later in the 1950's as the cry for independence hotted up in Northern Rhodesia, most of these settlers (white settlers) began to go away - of course having fenced up their farms. Now these farms are lying idle. We cannot touch them because legally they belong to absentee owners. This Gordian knot can only be untied by legal means, and the legal means is the Bill which is before this House. Either this Bill passes through, or the nation is held at ransom by absentee owners who demand as high as K3,000.00 per acre for the land which they originally got at 6d an acre. I will not allow my Ministry to be a party to this comedy of weakness".³³

Evidently it is the abandonment of the land that prompted the government to arm itself legally to obtain these land by forfeit. In fact, the white settlers had grabbed most of the fertile agricultural lands. The Monckton Commission of 1960 had revealed that the white settlers, numbered only in thousands, in the Rhodesias (Northern and Southern) took about 48 million acres of fertile land, as against 41 million occupied by the African millions.³⁴ Most of the land that Africans occupied was comparatively poor, and with low capacity of soil fertility. In these circumstances, it was only a reasonable recourse that the fertile agricultural lands belonging to absentee owners should revert to the state for its proper utilization in the interests of the nation.

The Mines and Minerals Act, on the other hand, vests all rights of ownership in, of searching for, mining and disposition of minerals, in the President on behalf of the Republic.³⁵ By virtue of this Act, every title to, interest in right over any minerals, of whatever nature, subsisting immediately before the commencement of the Act were extinguished.³⁶ Thus all the concessions acquired at the beginning of the century by the BSA Company came to an end.

Minerals not included in the Company's rights, such as those lands reserved to the Paramount Chief of Barotseland (now Western Province) as a result of the concession agreement with the company also passed to the state.³⁷ Introducing the Mines and Minerals Bill in the National Assembly, the then Vice-President, Mr. Simon Kapwepwe, spoke at length in outlining the objectives which the Bill was intended to achieve:

"The vast undeveloped areas over which mining rights have been tied up, stagnating for years, decades, almost for centuries will now be thrown open for development. Let us not shed any tears for those who have lost their mineral rights today. If they had prospected and explored their areas with energy and enthusiasm, if they had ~~had~~ the courage to invest money in the development of new mines, we would have been only too pleased to encourage them. But they did not.Through the attitude of these people, development of the Zambian mining industry has been crippled and deliberately held up. This was a situation which we as a people's government could not tolerate and which it was our duty to correct. The Bill which I am introducing achieves that object; by eliminating the old concession and Special Grants, the Bill will provide up-to-date procedures designed to control prospecting and mining activities in Zambia for the benefit of the people of Zambia. We are going to make quite certain that there is no repetition of Cecil Rhodes and his granting of mining rights in "perpetuity" or "forever and ever".³⁸

It is evident, therefore, that the government's policy behind the passage of this Act was to ensure that in future prospecting rights, exploration rights or mining rights will only be held for bona fide purposes of prospecting, exploration or mining, as the case may be. The Act stipulated the period of time for which these rights would be held - a mining licence was to be initially valid for six months, renewable for a further

period of twenty-five years as long as the holder of the licence submits a satisfactory programme showing that ore reserves remain to be exploited.³⁹ In each case the government reserved the right to participate in any mines which might result from any new mining operations.⁴⁰ Government's ultimate aim in passing this law was obviously to induce rapid development of the mining industry by making it possible for vast areas previously held by the two major companies, the Anglo-American and Roan Selection Trust, and which areas were hitherto unexploited under the special grant system, to become available for prospecting by other interested companies.

E. Compensation Provisions in Commonwealth African Constitutions and their Relationship to Economic Development

Having demonstrated that Commonwealth African bills of rights in fact completely prohibit expropriation of property of any description without compensation, it is now appropriate to look at the technique adopted by most of the African countries within the Commonwealth family to acquire property compulsorily. The practice of compulsory purchase has been instituted by most of these countries, so that the owner is compulsorily required to part with the property, and for this he receives for the property acquired its equivalent in money. In a sense it is as if the property has only changed the form as a result of a compulsory order of the government. It follows from this that if the property is not diminished in amount, but has only changed in form; the owner is entitled to its corresponding equivalent amount in the form of money. The underlying idea is that the owner of

the property purchased compulsorily ought to be put in as good a position pecuniarily as he would have occupied if his property had not been taken. The question of the quantum of compensation with respect to a property purchased compulsorily assumes considerable importance in a development state from at least two points of view. First, is the immediate financial effects of payment on the nation's limited domestic capital essential to economic development; and second, is the effect on foreign sources of capital as regards future investment in the country. For the present purpose our attention shall be focused primarily on the first of these view points, because the second view does not raise any problems of a constitutional significance.

In practically all of the Commonwealth independence bills of rights, payment of "adequate" and "prompt" compensation is a condition sine qua non if nationalization of foreign property is undertaken. Tanzania, which has never had a bill of rights, is the only exception. But even here, the Tanzanian statutes provide for "full and fair" compensation for the expropriated property rights, and prima facie, therefore, Tanzanian compensation laws do not provide for "prompt" or "immediate" compensation at the time of taking.

i) "Adequate"

The first constitutional condition subsequent to nationalization is that "adequate" compensation must be paid to the owner compulsorily deprived of his property. The inherent problem here is one of finding a workable definition

which should be attributed to the concept of "adequate" compensation. Should this, for instance, be taken to mean that the owner of the property acquired should be indemnified the full and perfect equivalent in money of the property taken? The USA Supreme Court had no difficulty in finding some practical standard by adopting the concept of market value. The owner has been said to be entitled to the "value", the "market value", and the "fair market value" of what is taken. By this the Court presumably meant that the owner is entitled to be awarded the amount equivalent to the price he would have bargained for if he was a willing seller selling in the open market.⁴¹ This is obviously the intendments of the bills of rights; in fact, the Kenyan bill of rights omits the use of the expression "adequate", and in its place stipulates "full compensation". Granted, therefore, that open market value is a permissible basis for calculating "full" and "fair" compensation, its application will certainly raise a complex of difficulties. Chief of these is the difficulty of imagining the circumstances in which open sale of the undertakings might take place. Where, for example, can an open market sale be available for the sale of the assets belonging to the mining companies, to the international banking institutions, or to the large industrial undertakings operating in the new nations? It is obvious that in these cases the assessment of ordinary market value will just involve assumptions which will make it unlikely that the appraisal will

reflect the true value of assets with precision. This, in effect, means that the application of the concept of market value in the above circumstances will involve, at best, a guess by informed persons.

It might be contended that where an open market does not exist, then the fair value of the property at the time of nationalization must be awarded. The problem of using "a fair market value" as the basis of paying compensation, is that it can be challenged by the owner of the property that a fair market value is something less than a full market value, and not, therefore, equal to "adequate compensation" within the meaning of the Constitution. It is quite obvious that a fair market value may be, and often is, less than full market value. Where an owner of the property was dispossessed of it compulsorily, therefore, he was able to challenge the constitutionality of the statute on the ground that a fair market value was something less than adequate compensation.⁴² Quite rightly he pointed out that a fair market value was not an exact or full equivalent in money to a full market value, and therefore the expropriating authority had given him an amount which fell short of that which the Constitution envisages. Thanks to the open-mindedness of the Nigerian court which refused to declare the statute void on the ground that it is not always that a willing seller in the market gets a full market value; and so if he gets a fair market value he is happy and contented - and accordingly compensation based on fair market value is adequate compensation within the meaning

of the constitutional provision. Moreover, a fair compensation, the court added, though not an exact or full equivalent in money, is nevertheless a just equivalent.

The experience encountered in the Nigerian High Court shows that unless the court is open-minded with respect to the prevailing economic needs of the country, government's programmes of the expropriation of private assets can easily be frustrated by the legal alertness of the owners of the assets concerned that they are entitled to a correct constitutional standard of assessing compensation. But what is more interesting about the Nigerian experience, is that the Court decided the case on purely "policy" considerations - the policy that government's genuine intention of bringing about utilization of a property in the interests of the whole community surely prevail as against individual enjoyment of that property. There are few lawyers in the common law jurisdictions who address themselves to the question that law is not purely an institution of conflict-resolution mechanism. Unlike the judge(s) who decided the Nigerian case, most of the lawyers in the Anglophonic legal world do follow the classical English legal ideology, analytical positivism, which teaches that the correct concern of a jurist is what the law "is". By this is meant that once a conflict is brought before the court, that court has to resolve the conflict from within the existing, or from pre-established, rules; analytical positivism does not train a lawyer to resolve the conflict by

taking into account what the law "ought" to be - i.e., from policy considerations.⁴³ The guiding dogma in the training of a lawyer in the whole of the Commonwealth world revolves on the concept of what Max Weber has called a "logically formal rationality";

"Legal thought is rational to the extent that it relies on some justification that transcends the particular case, and is based on the existing, unambiguous rules; formal to the extent that the criteria of decision are intrinsic to the legal system; and logical to the extent that rules or principles are consciously constructed by specialized modes of legal thought which rely on a high logical systemization, and to the extent that decisions of specific cases are reached by processes of specialized deductive logic proceeding from previously established rules or principles".⁴⁴

The function of the courts was thus limited to law-finding since its sources were limited to the legal order itself. To say that decisions of courts must be derived from pre-established rules is to leave no room for the court to generate appropriate law in an ongoing society. Courts do not function in a vacuum; they must follow the example of the Nigerian court which decided the Esi case by appreciating the fact that legal decisions must be reached from the background of the primary concern of a new, developing nation namely, economic development. The interpretations of the constitutional provisions in emergent states must surely take account of socio-economic realities and needs of these areas, and should not merely end at satisfying one individual as against the community at large.

ii) "Prompt"

Commonwealth bills of rights further required that in the event of a compulsory acquisition of property, "prompt" payment of compensation must be made. This requirement of prompt

payment probably constitutes a serious challenge on the capacity of a new nation to launch development plans along the lines of state ownership.⁴⁵ The grave effects of

the stipulations in the constitutions of emergent states that compensation must be paid promptly, ^{Nwabueze} has commented

that

".....It is a drag on development, because a new state, desirous of pursuing a programme of public ownership in both the industrial and commercial sectors, may lack the capital to pay prompt compensation for taking over privately-owned industries, banks, building societies, insurance companies and other commercial enterprises. What is objected to here is not the principle of compensation as such, for.....its right that, in the ordinary case, the state should pay compensation for depriving a person of the legitimate fruit of his labour or investment. But the principle of compensation should have been satisfied by the state accepting the liability to compensate, but without being obliged to do so promptly. Instead of prompt payment, the value of the property could be treated as a loan to be paid out of the profit of the business over a period of years".⁴⁶

In fact, the viewpoint expressed above, was raised by Mexico in her dispute with the United States. Mexico pleaded economic inability to pay "prompt" compensation for the real properties she had nationalized. She contended that a "transformation of the country, that is to say the future of the nation, could not be halted by the impossibility of paying immediately the value of the properties belonging to a small number of foreigners who seek only lucrative ends".⁴⁷ In answer, United States Secretary of State, Hall, rejected this on the ground that under every rule of law and equity no government is entitled to expropriate private property for

for whatever purpose, without provision for prompt, adequate and effective payment therefor. Hall's argument has been reinforced by Rea who contends that:

"Irrespective of the national policy underlying the expropriation, be it a general reform measure calculated to achieve social justice or an ordinary taking for the construction of a highway, for example, foreigners are entitled to compensation pursuant to the requirement of international law".⁴⁸

In the same way Domke has put it that:

"No justifiable reason appears to exist which would impose upon foreign owners the burden of contributing to economic improvements in the country from which they, mostly non-residents, will not derive benefits themselves".⁴⁹

One should probably comment here that these arguments are not wholly empty; but they unsympathetically fail to appreciate the situation that exists in the new and developing states. The issue is not that compensation shall not be awarded in respect of any nationalized foreign-owned assets, but one of devising a more realistic method of payment, taking into account the financial position of new nations. Many of these countries had endured long periods of exploitation by the nationals of the colonial masters, together with their profit-motivated companies.

It is quite obvious that this state of affairs must be corrected immediately after political independence - and the process of correction cannot be expected to wait until a new state is in a position to pay "prompt" compensation to the aliens. A German court has expressed sympathy for the position

of an ex-colonial country. That court in the Indonesian Tobacco Case⁵⁰ held that the principles of compensation would be applied to:-

"Individual expropriation of the usual kind and..... here, however, the expropriation of the Dutch companies constitutes at the same time a shifting of proprietary relations.....which was effected by a former colony after its independence in order to change the social structure..... Compensation could not be paid in full and promptly out of the substance, but only made out of the proceeds of the nationalized enterprises. Compensation as to time and amount must therefore be made in accordance with the conditions in the expropriating state. Thus the long-standing principle of strong protection of private property clashes here with the modern concept that under-developed countries must be given the possibility of using their own natural resources".

In the international arena, the Harvard Convention⁵¹ has squarely repeated the position taken by the German court. That convention has declared that where property is taken by a state in furtherance of a general programme of economic and social reform, compensation may be paid over a reasonable period of years, provided that the method and ^{modalities} of payment apply to nationals and non-nationals alike, a reasonable part of the compensation due is paid promptly, taking into account the general financial situation of the non-nationals concerned.⁵²

The prohibitive effect on socialist programmes of development of the guarantee of property in terms of prompt payment of adequate compensation, led Kenya to reject nationalization as a technique of development. According to the government White Paper on "African Socialism and its Application to Planning in Kenya", it is beyond doubt that

the principal influencing factor for the decision to reject the direct development strategies via the institution of nationalization, was the consideration of the cost of compensation. In the words of the Paper:

"nationalization is a useful tool that has been used in Kenya and will be used again when circumstances require. The pertinent questions are at what cost, for what purposes, and when. The Constitution and the KANU Manifesto make it clear that African socialism in Kenya does not imply a commitment to indiscriminate nationalization. These documents do commit the Government to prompt payment of full compensation wherever nationalization is used. Kenya's policy with respect to nationalization should be clearly defined within these stipulations".⁵³

It is, of course, true that other factors were also mentioned in support of the Government's argument against state ownership; these included, for example, the fear that nationalization may create a possible disincentive on individual enterprise and it may discourage private investment, especially from the capitalist countries - contrary to the Government's proclaimed objective of creating a "hospitable investment climate". The government was also worried over the question of syphoning limited domestic capital for the purpose of paying compensation to owners of the nationalized assets. This situation was correctly considered undesirable in that the money to be used to pay for the nationalized assets to the owners would most obvious leave the country increasing the country's foreign exchange and skilled manpower problems. In spite of all these problems that accompany nationalization, Kenya did not entirely reject resort to that technique as a

means towards economic development. There were specified circumstances within which compulsory acquisition was considered to be a reasonable resource, irrespective of the costs involved. Nationalization will be used in Kenya in the following situations:

- "i) When the assets in private hands threaten the the security or undermine the integrity of the nation; or
- ii) When productive resources are being wasted; or
- iii) When the operation of an industry by private concern has a serious detrimental effect on the public interest; and
- iv) When other less costly means of control are not available or are not effective."⁵⁴

Also specifically mentioned as an area where nationalization is desirable regardless of cost, is where a service is vital to the people and must be provided directly by government as part of its responsibility.⁵⁵ In all cases the Government of Kenya has insisted that when an industry is nationalized, it must be operated efficiently so that it can cover its costs and earn a profit at least equivalent to the taxes paid when operated privately. This should be so, the government further argues, because if taxes are used year after year to subsidize the nationalized industries, the nation has in fact gained little if anything by the act of nationalization.⁵⁶

The Kenyan Government is also using its limited development money to buy some of the formerly European-owned land and to make it available to Africans. Such purchases

have avowedly proceeded on a willing buyer/willing seller basis so as to avoid the constitutional provisions which would operate to control the transactions if such land was compulsorily acquired. Yet such purchases would have the same effect on development as indiscriminate nationalizations; namely, substantially to reduce the amounts the government can spend on new development schemes.

F. The Procedure for Assessing and paying Compensation under the African Commonwealth Independence Bills of Rights

One further interesting feature that merits discussion with respect to the taking of possession of property under practically all the independence bills of rights in Commonwealth Africa, is in reference to the following provisions: that the determination of (a) the legality of acquisition; (b) the right of the owner of property to compensation, and (c) the amount of such compensation, shall be matters within the jurisdiction of an ordinary court of law to adjudicate upon. Under the independence constitutions of Uganda (1962), Sierra Leone (1961), Malawi (1964), and Zambia (1964), the provisions were substantially similar in wording, namely, that where property is compulsorily taken possession of under any of the exceptions, the act of dispossession shall only be justified where:

".....Provision is made by a law applicable to that taking of acquisition securing to any person having an interest in or right over the property, a right of access to the High Court (only "court" in Zambia)....whether direct or on appeal from any other authority, for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation".⁵⁷

And, although the Kenyan independence constitution of 1963 contains a somewhat different wording, the basic principle under reference is nevertheless upheld, namely that:

"every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the Supreme Court to:
(a) the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled...."⁵⁸

It should be pointed out here that the suitability of the regular court of law to determine the legality of an acquisition of property and the owner's right to compensation is not questioned: this is, in fact, a traditionally appropriate function of a law court. But is the court a fit or appropriate forum for the purposes of assessing the amount of compensation? The exercise of assessing compensation is a technical and complex matter that does not, and cannot, only be based on formal accounting principles, in which case expert knowledge and advice can be available. Nor can one argue that controversies arising out of the implementation of socialist programmes can be disposed of by applying legal principles and procedures, pure and simple. Such considerations as the country's financial position, its foreign exchange position, the existing priorities and allocations between competing claims and the like - all these are matters that cannot be left out in the process of deciding upon the amount of compensation payable.⁵⁹ Thus it can be argued that the court is ill-qualified for the task, especially if what is acquired is a big business enterprise whose assets include goodwill and profit prospects.⁶⁰

As can be seen, the task of arriving at the amount of compensation can sometimes be a matter of straight bargaining in which policy and other considerations may be of primary importance.

G. Should Loss of "Goodwill" be Compensated?

In the ensuing discussion, an attempt is made to address ourselves to the pertinent question of whether or not loss of "goodwill" in relation to a property taken away should be compensated for or not. All along it has been assumed that a taking of any property by the government relates only to a taking of tangible or physical assets. But can property rights in the nature of intangible "assets" (of which "goodwill" is an example), be said to be the subject of a taking for which compensation must be paid? Put differently, would the action of destroying goodwill amount to an expropriation for the purposes of compensation? It has been said, for example, that where an enterprise is seized by the state, the normal method of computing compensation would be to take into account the value of the enterprise as a going concern; and as such, compensation would usually include at least some payment for "goodwill". This is so, it has further been suggested, because one of the elements of "value" of individual pieces of property which a state might seize, includes the unique value of the property to its owner.⁶¹ Consequently, a new nation employing the technique of nationalization as a means towards economic development, is urged to include payment of goodwill in every compensation amount in respect of any property acquired. There is no doubt that the claim that goodwill forms a substantial part of the value of the property in question, is a desire to introduce a capitalist criterion in assessing compensation. It must be pointed out here that the criterion to be used in computing

compensation is of critical significance in terms of future supplies of foreign investment and technology. Thus:

"how much to pay depends fundamentally on whom the country is trying to satisfy.....a payment that succeeds in not scaring off capitalist investors in time should generally satisfy investors from countries where previous shareholders live.....the more a country rejects capitalist criteria for compensation, the more likely it is that the socialist countries will be pleased and willing to supply technical expertise".⁶²

For the foregoing, it is clear that the choice of a criterion for compensation must be consistent with future economic planning and foreign aid in the fields of skilled manpower and financial investments. But whatever the case may be, it does not seem proper that goodwill in an emergent country must be compensated for. Moreover, it does not seem morally justifiable that even after the former owners of the businesses taken over have been extracting massive profits over a period of half a century using an unbelievably cheap labour, should still get large sums of compensation by insisting that invisible property rights should be taken into account as subjects of compensation. It must also be added that the owners of these businesses earned the so-called "goodwill" due to a number of factors - one of which was the supply of cheap labour by the economically colonized country; yet it is not known, and indeed highly unlikely, whether they ever took into account the fact that the country should be left with something in appreciation of its role in making their success possible.

Further, it should not be imagined that economic right of a foreign country can continue indefinitely in the nationalizing state free of legislative interference; for "property.....is no longer defined as a compound of tangible, real and personal assets, but is the totality of all rights and interest capable of legal protection which had economic value".⁶³ Further, as Fatouros has said:

"A radical change of the existing conditions may eliminate altogether the value of certain intangible assets. Thus, in a socialist economy operating under a strict state plan, the concept of goodwill or possession of customers largely loses its meaning".⁵³

An undeveloped country should therefore be left to pay as much and "no more" than will buy what it wants, whether it be management goodwill or investor goodwill.

H. The Need to create a Consistent Legal Infrastructure as a Prerequisite to Economic Reforms

Admittedly no ex-colony wanting to push through some programme of rapid economic, or even political change can succeed in this endeavour unless it makes bold changes in its laws - especially changes in its constitution. Radical social transformation implies a radical change in the law. It is for this reason that the constitution must be the first target in the process of inducing rapid economic development; that is, the inhibitive provisions on economic development must first be removed and replaced by more realistic ones. The Zambian experience in this regard again provides an excellent example of the way public ownership must first start with changes in the law. Thus it becomes necessary to illustrate our theme by recounting that experience.

1. Constitutional and economic reforms in Zambia

Zambia, like many other ex-colonies, inherited a typical laissez-faire capitalist economy that was built on the principles of free enterprise, private ownership of resources, and on profit motive.⁶⁵ It was this economic order that was reflected in the entrenched clauses of the independence constitution. Zambia, soon after independence, had formulated ambitious economic projects which could not be implemented without making some fundamental changes in the bill of rights. The economic development programmes which the government intended to embark upon were announced in the form of policy statements by President Kaunda. Since the attainment of independence in October 1964, there have been three such policy statement, viz.,

- a) The Mulungushi speech on April 19, 1968, entitled "Zambia's Economic Revolution";⁶⁶
- b) The Matero speech on August 11, 1969, entitled "Towards Complete Independence";⁶⁷ and
- c) A speech on November 10, 1970, entitled "This Completes Economic Reforms: Now Zambia is Ours".⁶⁸

i) The take-over of the industrial sector of the economy

At Mulungushi, the state sought to invite 27 companies to offer to the state a 51 per cent shareholding in their enterprises. The measures were taken to guard against exploitation by the foreign and expatriate-controlled companies. President Kaunda elaborated on this when he charged that:

"They (the firms affected) operate price rings with similar companies and create a false monopoly position because of the buoyant demand and the difficult supply position. They do not make enough efforts to move away from unacceptable sources and out-dated management philosophies. They still maintain personnel and training policies which are not in accord with the nation's present needs. They are failing to reinvest sufficient portion of their profits for the general expansion and development.....we have to safeguard the national economy and prevent unfair exploitation of the boom of conditions".⁶⁹

It is thus evident that Government's motive for the take-overs of the industrial field was the desire to check inflation and to supervise investment policies in the interest of the nation, and also the need to put up comprehensive programmes for the localization of staff in their section.⁷⁰ It is probably appropriate at this juncture to point out that the government was made sensitive by the unilateral declaration of independence in Rhodesia, and by the boom condition it induced in Zambia for both foreign-owned and expatriate-controlled non-mining companies. The "profit boom" occurred in the 1966/67 period when these companies made fantastic profits which, according to the government, enabled these companies to expatriate a substantial proportion of it from the country. The Mulungushi speech, therefore, was intended to design measures to prevent exploitation by these foreign and expatriate-controlled companies. The companies selected were in the construction industry where "prices have soared to astronomic heights"; in the transport section to "rationalize and co-ordinate the activities" of the transport companies "to direct them to co-operate in the national interest"; in the retail/wholesale

sector, "including all five retail chain stores, as a measure of control and a check on inflation"; in the brewing industry because of the monopoly position and "excessive profits"; and a few miscellaneous ones.⁷¹ The Industrial Development Corporation Limited (INDECO) was charged with the responsibility of looking after the state's participation in the industrial private business. Suffice it here to mention that INDECO was already in existence even before the above events had taken place; and had been established earlier as the arm of the government in business, and participated in that regard to a greater or lesser extent in some twenty companies in commerce, industry, transport and other fields.

INDECO, being a commercial public corporation incorporated under the Companies' Act,⁷² was charged to run the companies taken over in a proper and businesslike way, keeping in mind the national interest. It was also left to INDECO to negotiate values and terms of payment, but the President made it clear "that what they will pay is a fair value represented by the book value. There is no such thing as business goodwill or paying for future profits as far as I am concerned".⁷³ He further threatened that should the negotiations result in a deadlock, government was going compulsorily to acquire the shares in the enterprises concerned. One interesting aspect about the implementation of these take-overs was that the owners of the businesses taken over came out comparatively well as far as negotiations on the question of compensation were concerned. In the first place, they accepted an assessment

based on "fair value represented by the book value", which, because it excluded goodwill and future profits, was clearly less than the adequate compensation stipulated in the Constitution. In the second place, they accepted to be paid out from future profits. It should be pointed out here that when these take-overs took place, the Constitution had not been amended and had the "adequate" and "prompt" payment provisions still standing. Had the owners of the companies taken over insisted on their rights under the Constitution, the reforms might have proved difficult to implement, since the government would not easily have raised the needed large sums of money to compensate the owners. On the other hand, the affected companies were also well advised to agree to payment of compensation being spread over a period of time if they wished their activities to continue in Zambia. They were also well advised that it was realistic for them to adopt a positive attitude to the new form of co-operation, and to negotiate for the most favourable form of agreement as a basis for their future activities. It is true that government also contributed to the overall success of the negotiations by offering attractive incentives. For although the state became the majority shareholder in those businesses, operational control of the companies remained in the hands of the former owners under the management/consultancy agreements. The government in entering into these agreements had intended to retain the expatriate staff in view of the lack of skilled personnel

locally - particularly at the managerial level. The government also agreed to relax the exchange control regulations so as to exempt the 49 per cent shareholders from the requirement that the amount of remittable profits be limited to 50 per cent.

On the other hand, the take-over of the mining industry involved a considerable amount of background work on the part of the government. Here the amount of money involved was so enormous that it seemed unrealistic on the part of the government to trust to the mining companies accepting its terms. Moreover, it was not an easy task for the government to change the Constitution at that time in order to remove the restrictive provisions relating to property rights under Section 18. It will be recalled that at Mulungushi President Kaunda had announced that government had accepted in principle the need to amend that part of the Constitution which related to the compulsory acquisition of property.⁷⁴ The British had ensured in writing the independence constitution for Zambia that none of the fundamental rights (protection of private property right included) could be altered - except with the approval of a two-thirds majority of the National Assembly and also the approval of a 51 per cent majority of those of the electorate

entitled to vote in a referendum.⁷⁵ Moreover, the 51 per cent required was to be out of the registered voters; which meant that those who were absent, those who did not vote properly and those who were dead, were counted as if they had indeed voted. It was in these circumstances that a referendum was held on 17 June 1969, to remove the above constitutional provision requiring that a referendum should be held prior to the amendment of the fundamental freedoms and certain other provisions. An overall majority was duly obtained approving this course, and the Referendum (Amendment) Act⁷⁶ was passed to implement the above new developments. The only requirement now to change Chapter III of the Constitution was a two-thirds majority of the National Assembly.⁷⁷ With this the government was now in a position to repeal Section 18. Mr. Simon Kapwepwe, the then Vice-President and leader of government business in the House, spoke highly of the Constitution (Amendment) Bill when he was presenting it to the House. He said:

".....With this mandate (approval by the electorate to remove the referendum clause in the Constitution), we are now capable of going forward to remove the colonial obstacles which were put in our Constitution with satanic intentions. I have used the word "satanic" purposely, because this Constitution.....was imposed on us. It was to protect the British interests in this country. As such we were left out of the economic stream and our people could not participate in the economy of their country. In some cases we, the government, were left powerless to fight poverty and economic inequalities. Let it not be said that we got political independence, but we failed to achieve the economic independence for our people".⁷⁸

It has already been said that the 1960 Constitutional Amendment enabled the government to acquire without compensation mineral rights still held by individuals and private companies. But its relevance in the present context is that the restrictive provisions in the Constitution were abolished.

The abolished provisions were:-

- "a) The requirement that compulsory acquisition had to be necessary or expedient in certain specified interests;
- b) The requirement that compensation had to be adequate and paid promptly;
- c) The guarantee of the right of the owner to remit the compensation money to any country of his choice;
- d) His right of access to the court for the determination of compensation was also abolished".⁷⁹

The amended Constitution authorized compulsory acquisition effected under the authority of an Act of Parliament which provides for payment of compensation for the property, or interests, or right dispossessed of. An Act of Parliament such as is referred to above would, among other things:

- "i) Provide that compensation shall be paid in money;
- ii) Specify the principles upon which the compensation is to be determined, and
- iii) Provide that the amount of the compensation shall, in default of agreement, be determined by resolution of the National Assembly. No such compensation determined by the National Assembly can be questioned in any court on the grounds that it is not adequate".⁷⁶

The Lands' Acquisition Act referred to already, was passed to implement these provisions.

ii) The take-over of the mining industry

With the above changes in the Constitution, the President announced the government's intention to acquire a 51 per cent share participation in the two mining companies. The mining companies were those of the Anglo-American and Roan Selection Groups. With regard to the value and terms of payment, the President announced that he again intended to leave these matters to INDECO to negotiate. However, he made it clear once more that what the government would pay was a fair value represented by the book value, and that the government had no money to pay as a deposit against the shares acquired. INDECO was therefore left to negotiate payment out of future dividends.

For the Zambia Anglo-American groups, the assets, undertakings and liabilities of Nchanga, Rhokana, the Rhokana Copper refineries, and Bancroft, in which the government wished to acquire a 51 per cent holding, all merged into one operating company, the Nchanga Consolidated Copper Mines Limited (NCCM Ltd.). 51 per cent of the shares of this company was then to be distributed to a newly created government mining company, the Mining Industrial Corporation Limited (MINDECO Ltd.). The agreed audited accounts⁸⁰ of the assets of Anglo-American at

31 December 1969, gave a total book value of K127,642,137 (US\$178,698,992). Repayment of this amount was to be in the form of a compensation stock to be issued by the wholly government-owned Zambia Industrial and Mining Company (ZIMCO), which in turn wholly owned MINDECO Ltd. This stock was to be repayable in 24 semi-annual instalments at 6 per cent per annum interest, each of \$10,551,639 - as from 1 April 1970, and ending on 10 April 1982. The only qualification to this was that if, in any year after the fourth repayment, the total amount of interest and principal repayable in that year was more than two-thirds of the dividend that MINDECO received from NCCM, then there would be an accelerated repayment amounting to two-thirds of the "full market value";⁸¹ so that if good will of the businesses acquired had been taken into account, the compensatable amounts would certainly have been much higher. One can therefore conclude that the Constitutional Amendment of 1969 served a useful role in ensuring the successful implementation of the take-over measures.

iii) The Take-Over of the Financial Sector

Although state participation had so far been extended to the mining sector and the industrial field, the state did not have any stake in the area of finance, that is, the fields of banking, insurance and the building societies. It was imperative, therefore that the government should take measures to bring the financial sector under government control if the other take-overs referred to above and the measures to indigenize the retail/wholesale

businesses were to be effectively implemented. For how could an emerging, but aspiring Zambian businessman, who had just taken advantage of the new reforms in the retail/wholesale field of the economy, be expected to go very far in the absence of favourable credit facilities which could only be granted by financial institutions? The evidence available at the time of the nationalization of the financial sector, indicated that banks in the country formulated their investment policies primarily in terms of the interests of their outside parent organizations, rather than by the interests of the new nation. President Kaunda was very open in condemning the attitude of banks in Zambia:

"Comrades, traditionally banks have been seen as the epitome of capitalism, the ultimate owners of the means of production. Our experience in Zambia has been rather different. We disapprove of many of the policies of the head offices of the local banks..... I would merely say that they have been exclusively conservative in their staff policies, in opening new branches in the rural areas and in their credit policies. For example, they have only just started recently making loans to emerging farmers".⁸²

The take-over of a 51 per cent share participation in all banks in the country was announced on 10 November 1970, in a speech to the National Council of the ruling United National Independence Party (UNIP). The government took these measures in the hope that in future banking facilities would be spread to the rural areas where they were urgently needed, and also to influence formulation of more liberal policies towards lending money to emerging Zambian entrepreneurs. In the same speech the President announced that government had decided to nationalize completely building societies doing business in the country.

The reason for this decision was that building societies had been slow in adapting themselves to the interests and needs of the nation. For example, they still preferred commercial loans to housing loans; they still preferred to lend to companies rather than to individuals; they liked to lend in the urban and not in the rural areas. The government intended to provide remedies for the above inadequacies. To implement the one hundred per cent take-over of the building societies, the Building Societies' (Amendment) Act 1970,⁸³ was passed. Section 3 of the Act amends the principal Act so that now the Minister of Finance may, "if he is of the opinion that it is in the public interest so to do, cancel the registration of a building society". The discretionary power conferred on the Minister was no doubt intended to be used in order to implement government policy to assume a monopoly position by the state in the building field of the economy. Section 4 of the Act provides that a building society may, by resolution of its board of directors, transfer its engagements to the Zambia National Building Society.

In the field of insurance, President Kaunda also announced that no insurance company was going to be allowed to write up new business in Zambia. The already established Zambia State Insurance Corporation was to be enlarged in order to become the only insurance company in the country. The then existing insurance companies were not, as from 31 December 1970, to renew their existing insurance policies. They were to hand over their operations to the State Insurance Corporation which was to remain the only insurance company in Zambia. The government passed the Insurance Companies' (Cessation and Transfer of Business) Act 1970⁸⁴ - "An Act to restrict, regulate

and prohibit the carrying on of insurance business in Zambia; to provide for the transfer of subsisting contracts of insurance; to make provision for the protection of policy owners, and to provide for matters incidental thereto". The Act prohibits any person other than the State Insurance Corporation to enter into any contract of insurance after the end of the current year (i.e. 1970). Further, no person other than the Corporation was to renew any contract of insurance.⁸⁵ In Section 5(1) of the Act, all contracts of insurance subsisting at the commencement of the Act were to be transferred to the corporation. The Act imposes the duty on the corporation to provide, in accordance with sound insurance principles, adequate and proper insurance services and facilities of all classes throughout Zambia.

In order to administer the field of national finance, a new corporation called the Financial Development Corporation Limited (FINDECO), was set up. The idea of establishing a monopoly over the entire insurance business had been applied in Tanzania in 1967. The Tanzanian legislation, the Insurance (Vesting of Interests and Regulation) Act 1967,⁸⁶ provided for the acquisition of the entire insurance businesses in the country, and the vesting of a monopoly of insurance in the National Insurance Corporation. The Tanzanian and Zambian Acts sanctioning the transfer of all insurance businesses into a state-controlled company, do not provide for compensation to be awarded to the former owners of the insurance assets - the implication being that the owners of the companies affected are without remedy in Tanzanian and Zambian laws. This brings us to

a consideration of a pertinent question in this regard, namely: Were not the owners of the insurance businesses who were forced to pack up and go, not entitled to some form of compensation? Although the state merely proclaimed a total monopoly position in this field, and did not actually transfer to itself any corporeal assets, yet it is arguable that the government by so doing had incurred actual losses of a foreign insurance company forced to discontinue its activities. The losses thus incurred include:

"The losses incurred in closing down the company's business, disposing of assets, premises, office equipment, etc., the original expenses of which would have been incurred as an investment in the expectation of continuing business in the future; another example of the same kind of loss would be expenditure on training local citizens in insurance work....."⁸⁷

On the other hand, it has been argued that no government is bound to allow foreign interests to carry on business indefinitely, and that a foreign investor must take the risk of changes in the law of the country.⁸⁸ Assuming that this argument is tenable, the government is nevertheless under some moral duty as to how it terminates the permission given in the past to earn livelihood in the country. For although that permission might have been given by the former colonial power, still this alone should not be reason for an abrupt cancellation of insurance licences of foreigners. Moreover, Article 10(3)(a) of the Harvard Convention on the International Responsibility of States for Injuries to Aliens, referred to already, provides that:

"A taking of property includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference".⁸⁹

Obviously, the declaration of a total monopoly by the state in the field of insurance business, rendered the property of those formerly participating in the business economically useless, so as to frustrate the proper enjoyment of the property. Nor is it conceivable that the property involved could be disposed of within a reasonable time after the inception of government interference. The former insurance companies may have entered into contracts that extended over a considerable period in the future, and their performance may thus have been completely frustrated, and the expected profits thereon lost. In Zambia, Kaunda announced that as from 31 December 1971, existing companies would not be able to renew policies in the country. He said this on 10 November 1970 - and so the period of grace given to the companies to wind up their affairs was only one year. In Tanzania, the creation of a state monopoly of insurance was to have immediate effect, first with respect to life policies, and later, after an interval of eleven months, all forms of general insurance. The point that is intended to be put across here is that any government which excludes aliens from a certain means of livelihood, must allow them a reasonable time in which to arrange their affairs. The fixing of the time must not be determined arbitrarily, but must be based on accurate professional information as to how long it can take an insurance company to dispose of its assets. It must be emphasized that this is intended for the protection of individuals who have lost their means of livelihood, rather than for the companies.⁹⁰

J. The Indigenization of the Retail/Wholesale Sector of the Economy

One notable feature of the economies of emergent states soon after independence is the domination of the retail and wholesale businesses by foreigners. Probably with the exception of the remote rural areas, practically all of the urban retail/wholesale activities are controlled and dominated by European and Asian business communities, whose members have been resident in those countries for many years. The take-over of the big commercial, financial, industrial and mining concerns would, therefore, still have left the retail and wholesale trading enterprises in the hands of foreigners. Yet this is one area where local entrepreneurship would conceivably be promoted quite readily, and with minimum organizational and financial difficulties. This is so because most of these concerns are relatively small businesses which can easily be handled. Consequently, most of the newly-liberated African countries have taken measures intended to achieve indigenization of the retail and wholesale field.

At Mulungushi, simultaneously with the take-over of the twenty-seven selected companies in the industrial sector, President Kaunda also announced far-reaching measures intended to activate Zambian entrepreneurship. The President complained that:

"The banks, the insurance companies, the building societies, the hire purchase companies, and other financial institutions have not been willing to assist the Zambian businessman. So the level of Zambian business has remained low and unless we take firm action now, our Zambian businessmen will never catch up with the level of the resident expatriate businessman. These people have access to loan funds from banks, building societies, insurance companies, hire purchase companies, and every financial institution that exists in the country. It is therefore time to take more drastic steps to assist the people's ~~business~~ business to bridge the gap that exists between it and the resident expatriate business".⁹¹

The first measure which the government took in this regard, was to restrict local borrowing of expatriate enterprise, i.e. from this moment henceforth, the banks, the building societies, the insurance companies, the hire purchase companies and all the other financial institutions in the country were instructed to ensure that before approving a loan for business purposes to a company or partnership or an individual businessman, they must be satisfied that if it is a company its members and its shareholders are Zambians; if it is a partnership, that all the partners are Zambians; if it is an individual, that he is a Zambian.⁹² At the same time, it was announced that if the application for a loan came from a non-Zambian, the matter was to be referred to the Exchange Control Authorities who would approve it or reject it using the same criterion as the one obtaining in approving or rejecting applications for loans from foreign-controlled companies.⁹³ Now, as a matter of explanation, foreign companies, even before these measures were introduced, were not allowed to borrow money without limits. The amount of money they could borrow stood in some kind of relationship with the amount of money they brought into the country.⁹⁴ This is the criterion that the government intended to use with respect to the resident expatriate-controlled retail/wholesale enterprises, namely, the amount of money they were allowed to borrow was going to depend on the amount of their own investment. By this, the government thought that the financial institutions would then deflect their excess liquidity to promote Zambian business.

In the second place, the government took the measure of confining the areas of retail trading by non-Zambians to the centre of ten big towns only. From 1 January 1972, the ban on retail trading licences to non-Zambians was extended to the main town centres. Implementing these measures, the Trades Licensing Act was amended to contain additions to the effect that:

"Save with the consent in writing of the Minister responsible for Commerce and Trade, no Licensing Authority shall issue a reserved licence to an applicant who is not a citizen of Zambia....." ⁹⁵

The Act also provided that if any such reserved licence was issued in contravention of the above provision to a person who is not a citizen of Zambia, it shall be void.⁹⁶ If such a licence is issued to a person who, by reason of any event, ceases to be a citizen of Zambia during the period of validity of the said reserved licence, it shall upon the happening of such event, expire.⁹⁷ Further, the Minister responsible for commerce and industry was empowered to revoke, by statutory order, any reserved licence issued earlier to a non-Zambian.⁹⁸ By Section 17(4), a citizen of Zambia means:

- "a) In relation to an individual, an individual who is a citizen of Zambia;
- b) In relation to a partnership, a partnership which is composed exclusively of persons who are citizens of Zambia;
- c) In relation to a body corporate, a body corporate which is incorporated under the laws of Zambia Cap 686 - i.e., the Companies Act, and
 - i) is certified under the hand of the Minister to be controlled by the State

- ii) A) whose membership is composed exclusively of persons who are citizens of Zambia; and
- B) whose directors are exclusively citizens of Zambia; and
- C) which is not controlled, by any means, directly or indirectly, outside Zambia, or by persons who are not citizens of Zambia or who are associated in the capital structure thereof with persons who are not citizens of Zambia".

The stated objective of the ban recounted above in the area of retail/wholesale of the national economy was to compel non-Zambians to sell their businesses to Zambians through normal private contracts. This being the case therefore, there was no question of compulsory acquisition within the meaning of the Constitution. What had happened, in effect, was that the government had simply used its power through the mechanism of granting or denial of trading licences. The interesting legal issue is, however, whether the owners of these businesses could have successfully argued that the measures taken by the government amounted to a contravention of the constitutional protection against discrimination. Our view is that it is difficult to sustain that contention for the following reasons:

- i) The relevant provision in the Constitution on the protection against discrimination is contained in Article 25(1), which reads:

"Subject to the provisions of Clauses 4, 5 and 7, no law shall make any provision that is discriminatory either of itself or in its effect".

This protection, however, is made subject to the provisions contained in Clauses 4, 5 and 7. Clause 4 provides that Clause 1, that is, the protective provision, "shall not apply to any law so far as that law makes provision:(b) with respect to persons who are not citizens of Zambia....." The effect of these provisions in fact, amounts to a non-protection (so far as the constitutional guarantee against discrimination is concerned) of non-citizens of Zambia.

- ii) Secondly, the law regulating the issue of trading licences, The Trades' Licensing Act 1968, which has already been referred to, vests the discretion in the licensing authority to refuse an application for a licence if he is satisfied that it would be against the public interest to issue it, and the Minister can say on behalf of the authority what appears to him to be against the public interest.⁹⁹ As has been said elsewhere in this inquiry, an exercise of a discretionary power requires only the subjective satisfaction of the person or body vested with the discretion - in this case, the licensing authority. It seems clear therefore, that a denial of trading licences to non-citizens by the licensing authority cannot easily be challenged to be unlawful on the ground that it is against the public interest. This last statement should be tied up with our third reason, namely,

iii) That measures which are taken, such as the denial of trading licences to non-citizens, which are intended to transfer the economy, or an aspect of it, into the hands of the indigenous people, are measures "reasonably justified in a democratic society" such as Zambia - and any constitution deeply rooted in the values of democracy must seek to advance that objective. Let it be stressed here once again, that one of the primary functions of any democratic government in the newly-born state is to seek to establish the socio-economic conditions under which the dignity of its indigenous people must be founded - and the indigenization of the retail trading field is surely one practical and effective step towards that end.

K. Some Experiences in Uganda and Botswana

Of course Zambia was not the only African country which encountered the kind of legal problems that we have been explaining in the preceding paragraphs which were holding back efforts to induce development. Thanks to the decision by the Tanzanian government not^{to} incorporate a bill of rights in the Constitution of its country, Tanzania has, perhaps, been in the forefront in initiating and implementing socio-economic reforms. Had the country's Constitution included a bill of rights, the crisis there between human rights and efforts to transform its society socially and economically, would certainly have been greater. On the other hand, Uganda and Botswana, both countries with a bill of rights, experienced some of these problems.

1) Uganda

The stated socialist policy of Dr. Obote's government in Uganda was called by the name of the "Move to the Left" strategy.¹⁰⁰ It might be pointed out here that the military government of Amin was completely unfettered by any constitutional restraints in its endeavour to bring about the localization of the economy, while on the other hand, Dr. Obote's government had to start from the point of restructuring the inherited legal framework, which was not always facilitative in the implementation of the much needed economic programmes along socialist lines. The purpose of this section of the inquiry ^{is} therefore, to trace the history of economic nationalism in Uganda in the context of the kind of legal problems encountered in that part of Commonwealth Africa, and also to show how the constitutional protection of private property rights in the Ugandan independence constitution was altered to permit the acquisition of property by the state under more realistic conditions.

The genesis of economic nationalism in a clearly articulated form is probably traceable to the adoption of "The Common Man's Charter"¹⁰¹ by the Annual Delegates' Conference of the ruling Uganda People's Congress, as the broad and basic policy of the Party and government. This document, "The Common Man's Charter", was adopted "for the realization of the real meaning of independence, namely, that the resources of the country, material and human, be exploited for the benefit of all the

people of Uganda in accordance with the principles of socialism".¹⁰² What the Party affirmed therefore, was a fundamental belief that economic power in Uganda should be vested in the majority of the people and not in the minority, most of whom were aliens at that time. It was in consequence of this that the charter stated that "the guiding principle will be that the means of production and distribution must be in the hands of the people as a whole", and that the "fulfilment of this principle may involve nationalization of the enterprises privately owned".¹⁰³ The Annual Delegates' Conference of UPC directed the government to work towards the objective of whatever is desirable in the interests of the people, nationalizing any or all privately owned enterprises, freehold land, and all other productive assets of property, at any time, for the benefit of the people.¹⁰⁴

But "The Move to the Left" strategy, as stipulated in the charter, could not easily be realized because, as was the case elsewhere in Commonwealth Africa, the independence constitution written for Uganda in 1962 and also its Republican constitution of 1967, contained provisions entrenching the protection of private property rights. The provisions in question are the same requirement about "prompt payment of adequate compensation".¹⁰⁵ Naturally, the first task in the direction of "The Move to the Left", was for the government to use its legislative power to remove the constitutional obstacle posed to the realization of the nationalization stipulation in the charter. This was duly done in 1970 by the enactment of the Constitution (First Amendment) Act 1970.¹⁰⁶

The Amendment Act deleted the reference in the Constitution to "prompt" and "adequate" compensation, and thereafter the obligation was only "the payment of reasonable compensation".¹⁰⁷

The Amendment came into force on the first day of January 1970, and five months later an Act was passed to provide for acquisition of shares by the government or other public bodies in companies incorporated under the Companies' Act. The Companies (Government and Public Bodies' Participation) Act,¹⁰⁸ enacted that:

"As from the close of business on the 30th day of April 1970, the Government, or other public body declared by the Minister as such for the purposes of this Act by statutory instrument shall be deemed to have acquired such number of shares, not exceeding 60 per cent of each class of shares issued, and shall, after the coming into force of this Act, acquire 60 per cent of any shares which may be issued by the companies specified in Schedule 1 to this Act".¹⁰⁹

The Schedule under reference in the Act, listed 84 companies with issued share capital which were affected by virtue of the coming into operation of the Act. Moreover, the Minister was empowered by the Act to amend Schedule 1 by statutory order to add to, or subtract from, the list of the affected companies.¹¹⁰ It was further provided that until such time as nominees of the government or other public body were appointed to the Board of Directors of every affected company, such company was prohibited, on penalty of fine, to do any of the matters which were specified in Schedule 2 of the Act.¹¹¹ Thus, a company to which the Act applied was forbidden to dismiss or engage staff, sell its assets including stocks and shares, declare dividends, take on new liabilities, issue new shares, change its assets, change the salaries or terms of employment of staff, including terminal benefits, cancel or allow to lapse existing

insurance policies, go into voluntary liquidation or otherwise stop business, appoint new directors, or in any way vary the conditions, terms of service of remuneration payable to its directors."¹¹² The obvious intention of the government in writing these provisions into the Act, was to check on the anticipated possibility that some of the affected companies may engage in activities likely to frustrate government efforts to introduce a national component in the economy.

As regards compensation to be paid to the former owners of the shares acquired, the responsible Minister was to appoint a number of valuers to determine the values of the shares acquired; and payment for such shares acquired was to be made on the basis of the valuation made by the valuers. As in Zambia and Tanzania, the Ugandan Act specifically provided that the government was to pay for the shares so acquired from the profits received from the company, but in Uganda this was to be effected within a statutory period of time not exceeding 15 years. And any shareholder aggrieved by the determination of the value of his property by the valuers, has a right of appeal, first to a tribunal appointed by the Minister under the Act, and from there to the High Court. It is significant, perhaps, to mention here that as far as valuation of the amount of compensation of the acquired property is concerned, the Minister plays a very major role, which may sometimes operate to the detriment of the former owner. Under the Companies' (Government and Public Bodies Participation) Act, for example, the Minister may

make regulations providing for procedure for the valuation of shares, and may also make the same to provide for membership of the tribunal in hearing appeals under the Act.¹¹³ It is not without substance to allege that the Minister may prefer government's interest in the matter to prevail over and above that of an individual owner who is left completely unrepresented in the valuation process of his property. Through the Minister's statutory power to appoint valuers and also members of the appellate tribunal, plus his power to lay down the regulations providing for procedure for the valuation of shares, political considerations can predominate in the whole exercise so as to stultify the owner's entitlement to compensation. On the other hand, the owner's right of appeal to the High Court is at least a relief in the sense that any assessment based on extraneous considerations and which operates unfairly to the former owner can, hopefully, be checked.

At the same time, the Companies' (Government and Public Bodies Participation) Act provided for a complete nationalization of the import and export trade.¹¹⁴ After the 6th day of May 1970, no person other than the government or other public body was authorized to engage in import and export business; and any licence granted to anybody under any provision of any written law which was in force immediately before the appointed date of 6th May 1970, was forthwith cancelled - but without prejudice to goods in transit.¹¹⁵ The Export and Import Corporation¹¹⁶ exercised the sole right in the country, on behalf of the government, to import

and export goods of any class or description for the purpose of trade. The Corporation is empowered, for the purposes of carrying out its export and import business, to acquire compulsorily any of the premises, fixtures, fittings or any ancillary equipment used by the former importer or exporter in the course of his business.¹¹⁷ Any such former importer or exporter whose property has been subjected to compulsory acquisition effected under the authority of the Act, has a statutory entitlement to compensation from the Corporation. The compensation is assessed on the basis of a valuation made by the valuers appointed in accordance with the provisions of the Companies' (Government and Public Bodies Participation) Act 1970, which has already been discussed. It is an offence, under the Export and Import Corporation Act 1970, punishable by fine, to refuse to give or in any way to obstruct the Corporation from taking of any premises, fixtures, fittings or ancillary equipment.¹¹⁸

ii) Botswana

In 1969, Botswana also joined Zambia and Uganda in the recognition that there was need to adjust the Constitution to permit the objectives of economic development to be implemented. The Constitution (Amendment and Supplementary Provisions) Act 1969,¹¹⁹ allowed the Government of Botswana to acquire compulsorily property if the purpose of the act of acquisition was to secure the development or utilization of the property for a purpose

beneficial to the community. The actual and compelling motive behind the government's intention in passing the Amendment was the need for the exploitation, on a commercial basis, of the mineral deposits in Botswana, and the obvious necessity of having the mineralization of the country under the control of the state.¹²⁰ For this reason the Amendment went beyond the existing provisions which permitted compulsory acquisition if it was necessary or expedient in order to secure the development or utilization of property for a purpose beneficial to the community - now the Amendment specifically extended the authority of compulsory acquisition to the development or utilization of the mineral resources of Botswana. In the second place, the Amendment enacted that the stipulation about "prompt payment of adequate compensation" "shall be deemed to be satisfied in relation to any law applicable to the taking of possession of minerals or the acquisition of rights to minerals if that law makes provision for the payment at reasonable intervals of adequate compensation".¹²¹

It will have become clear from our survey of the nature of the constitutional provisions protecting property rights in Zambia and other Commonwealth African states, that they operated to inhibit governments' plans intended to induce the much needed socio-economic improvements in the lives of the people, and the well-being of the country. The constitutional reforms that we have noted were a response to the frustrations engendered by those provisions on the part of the government. However, in the process of effecting alterations to the bill of rights,

there is no doubt that the value of the rights guaranteed by the Constitution - especially the right to property ownership - has been greatly diminished. It can therefore be said that the exigencies of economic development, like those of national security, constitute an incidence operating to limit the full enjoyment of human rights. However, there is yet another factor explaining why human rights have failed to operate successfully in emergent states. The incidence of a one-party state is also one factor whose features, or some of whose features are incompatible with a bill of rights. The next chapter examines the extent to which the system of a one-party system impinges on the practical fulfilment of the principles implied in the concept of human rights.

NOTES

1. A substantial portion of this chapter is an extract from my LL.M. dissertation presented to the University of Zambia in 1975.
2. D.V. Cowen, The Foundation of Freedom (Oxford, 1961), p.120.
3. The Rule of Law in a Free Society, Report on the International Commission of Jurists, New Delhi, 1959, p.3. Author's own emphasis.
4. Presidentialism in Commonwealth Africa, op.cit., p.354.
5. Harry M. Jones, "The Rule of Law and the Welfare State", in Essays in Jurisprudence, Columbia Law Journal (New York, London, 1963), pp.400-401.
6. Dr. Tawia Ocran, "Law, African Economic Development and Social Engineering", ZLJ, Vol.3, p.17.
7. Jomo Kenyatta, quoted in Lord Brockway, African Socialism (1963), p.23.
8. Ibid., p.14.
9. See, The New Encyclopaedia Britannica, Macropaedia Vol.II, on "Marxism", (H.H. Benton, 1973-1974, London), pp.549-60, especially pp.554-55.
10. Ibid.
11. Ann Seidman, Comparative Development Strategies in East Africa (1972), p.75.
12. See, the 1962 Ugandan Constitution, S.22(1) in Constitutions of Nations (1964), Vol.1, p.931.
13. (1968), ZLR 99.
14. Ibid.
15. Ajakaiye v. Lieut.-Governor (1929) 9 N.L.R. at P.5 (PC), discussed in Nwabueze's Presidentialism in Commonwealth Africa, op.cit., p.357.
16. See, for example, S.18(4)(a) of the 1964 Constitution of Zambia.
17. This point is advanced by Professor Umozurike, Nationalization of Foreign-owned Property and Economic Self-Determination, E.A.L.R., 1970.
18. Lord Brockway, African Socialism, op.cit., p.114.

19. James McMillan and Bernard Harris, The American Take-over of Britain (1968), quoted by Harvey and Bostock (eds.) in Economic Development and the Zambian Copper (1972), infra.
20. Cited in Nationalization of Foreign-owned Property and Economic Self-Determination by U.O. Umozurike, E.A.L.R. (1970), p.98.
21. ^{Figures taken from} Bostock and Harvey (eds.), Economic Independence (Praeger Publishers New York, London, 1972) p.4. ^{Note that figures are expressed in percentage}
22. Nwabueze, Presidentialism in Commonwealth Africa, op.cit., p.359.
23. In B. de Gray Fortman (ed.), After Mulungushi: The Economics of Zambian Humanism (Nairobi, 1969), Ch.5.
24. Constitution (Amendment) (No.5) Act, 1969.
25. Ibid.
26. Act No.2 of 1970.
27. Act No.32 of 1976, formerly Cap.329.
28. S.3 of the Act, op.cit.
29. Cap.87.
30. Op.cit.
31. See, for example, Harry Nkumbula v. Attorney-General (1972), ZLR, 205 at 209.
32. See, generally, Part IV of the Act, op.cit.
33. Parliamentary Debates, Hansard No.20c of 4th December 1969.
34. See, The Report of the Monckton Commission, Cmnd.1149, Ch.13.
35. S.3(1) of the Mines and Minerals Act.
36. S.3(2) of the Act, op.cit.
37. See, the Western Province (Land and Miscellaneous Provisions) Cap.297.
38. Parliamentary Debates, Hansard No.20d of 5th December 1969.
39. S.51(1) and (3)(a) of the Mines and Minerals Act, especially 329 (unamended).
40. This results from S.3(1) and (2) of the Mines and Minerals Act, ibid., vesting all rights in minerals in the President on behalf of the State.
41. U.S. Miller (1942), 317 US 369.

42. Esi v. Warri Divisional Planning Authority, suit No.M/2/1966 of 20.6.69, High Court (Nigeria) unreported. Quoted in Nwabueze's Presidentialism in Commonwealth Africa, op.cit., p.369. See also, New Munyu Sisal Estates Ltd., v. Attorney-General (1972), LEA 88.
43. For an extended discussion on this subject, see R.B. Seidman, "Law and Stagnation in Africa", ZLJ (1973), p.39.
44. Max Weber, Law and Economy in Society (Harvard University Press, Cambridge, Mass., 1956), pp.653-58. This theory is further elaborated upon by David Trubeck, "Towards a Social Theory of Law: An Essay on the Study of Law and Development", Yale Law Journal, Vol.82, No.1 (1972), especially at pp.11-18.
45. Nwabueze, Presidentialism in Commonwealth Africa, op.cit. p.365.
46. Ibid.
47. Quoted in Steiner and Vegts, Transnational Legal Problems, p.321.
48. See, E.D. Ree, "The Nationalization of Foreign-owned Property", 36 Minnesota Law Review (1951-52), p.323.
49. Martin Domke, "Foreign Nationalizations", 55 A.J.I.L. (1961), 585, at 607.
50. See, 54 A.J.I.L. (1960) 305, at 317. Quoted by Martin Domke in "Indonesian Nationalization Measures before Foreign Courts", ibid., p.305.
51. The Convention is reproduced in the article by Louis Sohn and R. Baxter, "Responsibility of States for Injuries to the Economic Interest of Aliens", 55 A.J.I.L. (1961), pp.545-84.
52. Article 10(4)(a) and (b) of the Convention, ibid., p.553.
53. African Socialism and Its Application to Planning in Kenya, Sessional Paper No.10 of 1967, Para.73.
54. Ibid., Para.75.
55. Ibid., Para.77.
56. Ibid., Para.76.
57. See, Peasle, Constitutions of Nations, Vol.1 (1964), pp.931, 723, 485, and 1034. This relates respectively to S.22(1)(b)(ii) of the 1962 Ugandan Constitution; S.17(1)(b)(ii) of the 1961 Sierra Leonean Constitution; S.16(1)(b)(ii) of the 1964 Malawian Constitution; and S.18(i)(b)(ii) of the 1964 Zambian Constitution (before amendment in 1969, see below).
58. See, Article 19(2) of the 1963 Kenyan Constitution.

59. The point is also emphasized by Nwabueze in Presidentialism in Commonwealth Africa, op.cit., pp.362-3.
60. Ibid.
61. See, C.C. Christie, "What Constitutes a Taking of Property in International Law" (1962), B.Y.I.L., p.319.
62. Bostock and Harvey (eds.),
63. A.W. Bradley, "Legal Aspects of the Nationalizations in Tanzania", 3 E.A.L.J., Vol.II (1967), at p.165.
64. Cited in ibid.
65. On this theme, see President Kaunda, "Zambia Towards Economic Independence", in B. de Gaay Fortman (ed.) After Mulungushi: The Economics of Zambian Humanism, op.cit., Ch.5.
66. Ibid.
67. Address by President Kaunda to the UNIP National Council, at a meeting held at Matero Hall, Lusaka, 11 August 1969, ZIS (Government Printer, Lusaka, 1969).
68. Address by President Kaunda to the UNIP National Council, at a meeting held at Mulungushi Hall, on 10 November 1970, (Government Printer, Lusaka, 1970).
69. President Kaunda, quoted in B. de Gaay Fortman (ed.), After Mulungushi: The Economics of Zambian Humanism, op.cit., at pp.66-68.
70. See, Bostock and Harvey (eds.),
71. Ibid.
72. Cap.686.
73. B. de Gaay Fortman (ed.), After Mulungushi: The Economics of Zambian Humanism, op.cit., p.67.
74. Ibid., pp.66-68.
75. See, Section 72(3) of the 1964 Constitution (before 1969).
76. The Referendum (Amendment) Act, No.5 of 1969.
77. Constitution (Amendment) Act, No.33 of 1969; see, S.4, which repealed S.18 of the Independence Constitution.
78. Parliamentary Debates, Hansard No.19c, of Thursday, 9th October 1969.

79. See, The Constitution (Amendment) Act, No.33 of 1969.
80. The figures that follow are derived from Faber and Potter, Towards Economic Independence: Papers on the nationalization of the copper industry in Zambia (Cambridge University Press, 1971), p.109.
81. Ibid.
82. President Kaunda, "This Completes Economic Reforms: New Zambia is Ours", op.cit., p.9.
83. Act No.67 of 1970.
84. Act No.66 of 1970.
85. S.4(1)(2) of the Insurance Companies (Cessation and Transfer of Business) Act, 1970.
86. Act No.4 of 1967.
87. See, A. Bradley, Legal Aspects of the Nationalization in Tanzania, op.cit., p.169.
88. Ibid.
89. Quoted by A. Bradley, ibid., p.11.
90. This point is stressed by A. Bradley, ibid., pp.11-12.
91. B. de Gaay Fortman (ed.), After Mulungushi: The Economics of Zambian Humanism, op.cit., p.51.
92. See, President Kaunda, "Zambia towards Economic Independence", in B. de Gaay Fortman (ed.), After Mulungushi, etc. ibid., p.52.
93. Ibid.
94. Ibid.
95. See, S.17(1) of the Trades Licensing Act, No.41 of 1968.
96. S.17(3)(a), ibid., as amended by Act No.41 of 1969.
97. S.17(3)(b).
98. S.28 of the Act, as amended by Acts No.41 of 1969 and No.22 of 1971.
99. S.25(4) and (6) of the Act.
100. For an interesting discussion of this subject, see A.G. Gingyara-Pinyura, E.A.J., February 1970, pp.23-29.
101. Dr. Milton Obote, The Common Man's Charter (Government Printer, Entebbe, 1970).

102. Ibid., Para.1.
103. Ibid., Para.38.
104. Ibid., Para 39.
105. Article 13 of the 1967 Constitution.
106. Act No.2 of 1970.
107. See, S.1(a)(b), ibid.
108. Act No.3 of 1970.
109. Act No.3 of 1970, S.1(1).
110. S.2, ibid.
111. S.4(1), ibid.
112. See, S.4(5) and also Schedule 2 which specified penalties, ibid.
113. S.3, ibid.
114. S.5(1), ibid.
115. S.5(2), ibid.
116. Act No.4 of 1970.
117. S.3(1), ibid.
118. S.4(1)(b), ibid.
119. Act No.30 of 1969.
120. Ibid.
121. Ibid.

PART III

HUMAN RIGHTS AND THE ONE-PARTY CONSTITUTION

CHAPTER 8

HUMAN RIGHTS AND THE ONE-PARTY STATE (1)

A question can be posed here as to how far is the effective protection of fundamental human rights compatible with the adoption of a single-party system of government? Of the twelve Commonwealth African states, five are or have been established as de jure one-party states - these are Ghana (1964-66), Tanzania (1965), Malawi (1966), Zambia (1972), Sierra Leone (1978). Three of these, that is Nkrumah's Ghana, Tanzania, and Malawi rejected the incorporation of a bill of rights as a substantive part of their single-party constitutions. It is thus notable that Zambia (1973) and more recently Sierra Leone (1978), the two most recently created de jure one-party states in Commonwealth Africa, have on the contrary, opted for the retention of a bill of rights in their single-party constitutions. Recently, in September 1976, an international seminar organized by the International Commission of Jurists on 'Human Rights in a One-Party State', urged in its conclusions that:

".....national constitutions [i.e. of one-party states] should include justiciable bills of rights".¹

But can an enforceable bill of rights exist in, and be compatible with, a de jure one-party system? If it can, are there areas of the bill of rights which, nevertheless, cannot operate within the single-party constitutional set-up? Since, among the single-party systems, it is in Zambia that individual rights have received formal constitutional protection for the longest period, the question posed for the present investigation will be answered with reference to the Zambian experience - although of course some comparisons with the positions obtaining in Tanzania, Malawi and Sierra Leone will be included in the appropriate contexts.

However, before coming directly to the central theme of this chapter, it is obviously necessary to appreciate the background to the establishment of single-party systems in Commonwealth Africa - their origins and spread, reasons for their adoption, and the various methods employed for their establishment.

A. The Origins and Spread of Single-Party Systems in Commonwealth Africa

i) Origins:

Although rule by a single-party made one of its first appearances in the communist countries of Russia and China, its origins and spread in Africa seem to have arisen from the constitutional experiences of the francophone African states. Before the adoption of either presidential rule or single-party systems in Commonwealth Africa, the francophone states had already experienced governments under these systems. Thus it might be hypothesized that events in the neighbouring francophone states might have provided a cue for similar events in the neighbouring Commonwealth African states. Ghana, for example, which first adopted the one-party system in anglophonic Africa was in proximity with francophone colonies like Guinea, Senegal, Mali and the Ivory Coast - all of which had already established single-party systems of government.

It is relevant to observe that human rights in those constitutions which drew their inspiration from the Gaullist model of France are protected merely by way of a preamble. The constitutions of francophone African states have indeed

implemented the approach to the protection of the 'Rights of Man and Citizens' with which the mother country - France - is traditionally associated. It is interesting to note that this approach is closely reflected (though in different forms) in at least three of the de jure one-party states in Commonwealth Africa - Ghana (1960), Tanzania and Malawi.² It is not out of place to conclude, albeit tentatively, that the constitutional practices in the francophonic Africa had some impact on the constitutional developments in post-independence Commonwealth Africa.

ii) Spread

As already stated, Ghana became the first Commonwealth African state to establish a de jure one-party state in 1964. The Convention Peoples' Party (the CPP) under President Kwame Nkrumah therefore became the only legally recognized party. A year later, Ghana's example was followed by Tanzania which constitutionally established the Tanganyika African National Union (TANU), on mainland Tanzania, and the Afro-Shirazi Party (ASP) on the island of Zanzibar as the only political parties in the 'Union' of Tanzania through which all political activities are to be conducted. TANU and ASP have now merged into one party, the Chama Cha Mapunduzi Party since the union between Tanganyika and Zanzibar became complete in 1977. In 1966 Malawi followed suit when Dr. Kamuzu Banda's Malawi Congress Party (MCP) became the "only one National Party". Zambia became legally a one-party state seven years later in 1973. Sierra Leone is the newest single-party state, having adopted this system of government in 1978.

Apart from these de jure one-party states on the African political scene, another set of de facto one-party states has arisen. With the banning of the only remaining opposition party, the Kenya Peoples' Union (KPU), Kenya has been, since 1966, a de facto one-party state - the only party remaining being the late Jomo Kenyatta's Kenya African National Union (KANU). Uganda too had in effect become a de facto one-party state in 1969 with the disappearance of the Kabaka Yekka (KY) and the Democratic Party (DP). President Obote's Uganda Peoples' Congress (UPC) remained as the only party in the national politics of Uganda.

A peculiar situation also arose in 1970 in Lesotho. Ruled since independence by Chief Leabua Jonathan, who executed a coup in 1970 when it became clear that his party was losing the first general election since independence. He is currently heading a civilian revolutionary government without parliament, and so this type of governmental system may be regarded as a 'no-party system'. Also included in this category are those states ruled by military governments - Ghana, Nigeria and Uganda.

The final picture that emerges from the Commonwealth African political situation is that out of these twelve states only two, Botswana and Gambia, have preserved a multi-party system of government, and even these have 'dominant-party' systems. The question is naturally prompted as to the reasons for the increasing predominance of the one-party system in Africa.

B. Reasons for the Adoption of Single-Party Systems in Africa

A number of reasons have ^{been} advanced in support of the case for the establishment of a one-party system of government wherever

this has occurred in Africa. On this matter the Zambian situation is in marked contrast with that of Tanzania.

In Tanzania the case for a one-party system was largely based on the fact that throughout the political history of that country, the Tanganyika African National Union (TANU) had received overwhelming support from the people of Tangyanika. Since 1958, when the first elections to the Legislative Council were held in Tangyanika, and from then on in all successive electoral contests, both national and local elections, TANU had been winning virtually all the seats.³ Indeed, there were many unopposed seats in favour of TANU, and opposition in Tangyanika had virtually disappeared at the time of independence in 1961. As the Presidential Commission on the establishment of a Democratic One-Party State asserted after recounting the country's political history,

"....the prospects of contested elections has steadily receded and Tangyanika in fact, though not in law, is now a one-party state".⁵

From this the government argued that so long as the law permitted other parties to exist, TANU was bound to fight elections, both national and local, on a party basis. Since candidates put forward by TANU had been overwhelmingly successful, many even being unopposed, the people had in effect abandoned their right to choose representatives to parliament. It was therefore argued that only in a single-party system in which candidates belonging to the same party, TANU, could compete for election would the principle of choice be restored to the Tanganyikan electorate.

Because almost all members of parliament were TANU members, discussions in parliament, even on important issues of policy were inhibited because MPs were required to accept party discipline as to how they ought to behave in parliament. Nyrere himself put this argument in this rather eloquent fashion:

"Given the two-party system.....some limitation of freedom is essential - both of election time and in debate - in order to enforce party discipline and unity. And we have seen that these restrictions are not necessary where you have only one party. It seems at least open to doubt, therefore, that a system which forces political parties to limit the freedom of their members is a democratic system, and that one which can permit no party to leave its members their freedom is undemocratic. Where there is one party, and that party is identified with the nation as a whole, the foundations of democracy are firmer than they can ever be where you have two or more parties, each representing only a section of the community".⁵

Thus the Tanganyikan case for the establishment of a one-party state in the political circumstances outlined above, seems to rest on a persuasive ground. The story in Zambia was, however, almost the opposite to the one prevailing in Tanganyika.

Unlike the case of Tanzania, Zambia has been a multiparty state since even before independence (1964).⁶ The Nationalist Movement split in 1958 when the present ruling party, the United National Independence Party (UNIP) broke away from the African National Congress (ANC) led by Mr. Harry Nkumbula. There was also a white settler political party, the United Federal Party (UFP), which changed its name after independence to 'National Progressive Party' (NPP). Moreover, the opposition in Zambia had a strong base of support in certain parts or provinces of the country. Further, the electoral performance maintained by the opposition parties in Zambia show that its strength had steadily been

gathering momentum. In the 1962 elections, which were held with a view to introducing self-government in Northern Rhodesia, UNIP was unable to secure the required number of seats in the Legislative Council in order for it to form the government.⁷ UNIP had to form a coalition with ANC in order to prevent the settler United Federal Party from seizing power. At independence the three parties, UNIP, ANC and NPP, competed for power in the 1964 elections. Out of the contest UNIP had fifty-six elected members in Parliament, ANC obtained eight seats, and the NPP came out with ten members elected on the reserved European roll. 1968 also happened to be an election year. The NPP having been dissolved in 1968, the contest was between UNIP and ANC. The results were that UNIP emerged with eighty-one elected members and ANC with twenty-three members only. What was interesting about the results of the 1968 election was that Western Province, formerly a UNIP stronghold, rejected almost all candidates sponsored by UNIP.

The government of Zambia, through the President, had in fact recognized the potency of opposition and so had envisaged the creation of a one-party state, not by 'force', but 'consensus'. President Kaunda, in March 1964 (i.e. seven months before independence) had assured the nation that:

".....any disappearance of the parliamentary opposition in this country and the introduction of one-party system would not be, and I emphasize, would not be an act of the government, but would only be according to the wishes of the people of this country.....as expressed at the polls in any future elections".⁸

Three years later, that is in 1967, the President reiterated the same principle when addressing an Annual Conference of UNIP held at Mulungushi; he summarized government's stand on this matter through four neat points, viz.,

- "1. That we are in favour of a one-party state;
2. That we did not believe in legislating against the opposition;
3. That by being honest to the cause of the common man we would, through effective party and government organizations, paralyze and wipe out any opposition, thereby bringing about the birth of a one-party state;
4. That we go further and declare that even when it comes about we would still not legislate against the formation of opposition parties, because we might be bottling up the feelings of certain people no matter how few".⁹

One of the obvious effects of the results of the 1968 elections was that it worked against government's plan for the destruction of the opposition through the ballot box. The government's hope for a voluntary disappearance of the opposition further suffered a set-back with the occurrence of certain political developments in 1972. Chief of these developments was the formation of the United Progressive Party (UPP) headed by the former Vice-President, Mr. Simon Kapwepwe. The political implications engendered by the formation of UPP were so vast - for example, most of its leaders were eminent figures in Zambian politics who had played an important role in the nationalist struggle, and who were the founders of the nationalist movement. Secondly, the new party's base of support was among the Bembas, the most dominant and populous tribe in Zambia (covering three of the eight provinces of the country, including the most populous province of the Copperbelt).

The political climate which resulted from the emergence of UPP on the political scene of Zambia was tense and manifested itself in nationwide appeals not only for the detention of its leaders, but also for the introduction of a one-party state. In the wake of these demands from every part of the country, the government abandoned its original stand, which was that although the one-party state was desirable and perhaps inevitable, no legislative action should be taken to prohibit other parties. President Kaunda now insisted that the government's decision to bring about a one-party state through legislation was in accordance with the wishes of the people, because:

".....since independence there has been a constant demand for the establishment of a one-party state in Zambia. The demands have increasingly become more and more widespread in all corners of Zambia. In recent months I have received hundreds of messages and letters from organizations and individuals appealing to me to take concrete steps to bring about a one-party system of government. In the resolutions passed by almost every conference, whether political or non-political, unequivocal demands have been made for government to introduce a one-party system of government. Chiefs last year joined the chorus of the overwhelming majority of the people. Indeed, the UNIP National Council sitting in Mulungushi Hall between 1 and 3 October last year, ^{changed} the central committee of the ruling party to work towards the achievement of a one-party democracy....."¹⁰

But, as Nwabueze had observed, these demands which the President was referring to "were made by UNIP partisans, and should not be taken as conclusive of the wishes of the Zambian people as a whole".¹¹

However, Zambia did not provide an ideal situation, as did Tanzania, for unilateral action on the part of the government to introduce a one-party state. That this nevertheless happened,

meant that the opposition parties of UPP and ANC, which enjoyed popular support in some provinces of the country, were forced out of existence.

i) The argument based on national unity

Probably the most forceful argument in favour of the introduction of a one-party state in Zambia was that Zambia needed a one-party state not because, as in the case of Tanzania, the country was solidly united; but because the country was dangerously divided. Zambia, like many other African states, is a culturally heterogeneous society consisting of a series of ethnic groupings (about 73 such groupings in all). The political order established in Zambia at independence, being a blend of Westminster parliamentary democracy, was devised on the assumption that power to rule was to be the subject of political competition between the various political parties. Now, while the dominant party, UNIP, evidently projected a national outlook and endeavoured to recruit membership and support from every corner of the country, the smaller parties were content to seek support and loyalty from a particular region or tribe from where the top leaders came.¹² A Zambian cabinet minister, Mr. Sikota Wina, speaking in favour of the introduction of a one-party state in Zambia warned that:

"Without the emergence of a dominant single party such as the United National Independence Party which comprised all the tribes, the post-independence government of Zambia could only have been formed by a coalition of four or more tribal political parties, since political parties would necessarily have been along purely provincial lines, with obvious and tragic consequences".¹³

Mr. Sikota Wina therefore submitted that "...it alone [i.e. the one-party state] permits the growth or creation of a sense of nationhood in newly independent African countries".¹⁴

There is no doubt that the need for national unity is a compelling one in new nations of Africa, and that any arrangement which would foster its realization must be preferred. Moreover, it is only when national unity, and therefore stability, is assured that the government can proceed effectively to plan and execute socio-economic projects intended to raise the level of standards of living among the people. The masses were led to believe that once independence was achieved, immediate improvements in their social and economic condition were to follow - and most of these promises came from the leaders of the dominant party. Hence continued survival of the party, and therefore the government, depended largely on how quickly the impact was made on satisfying the basic needs of the people. Moreover, the opposition would naturally exploit the failures of the government in economic planning and in the implementation of programmes designed to induce the equal redistribution of wealth to the benefit of the people.

Few would dispute the validity of the argument based on national unity in the circumstances of new African states. True, all those forces that operate to draw people apart must be discouraged, and a base conducive to securing national solidarity must be laid down. But this does not prevent one

asking the question as to the best means of achieving that solidarity. It can thus be argued that any such method necessary to bring about national unity must not lose sight of the interests of all people and the desire to maintain a democratic society founded on respect for human rights. The question of how best to preserve human rights is, of course, a moot question as experience has shown in Britain, Tanzania and some other countries which have no constitutional bills of rights but where, nevertheless, personal liberty forms part of the whole basis of their democratic practice. The one-party state creates a constitutional system whereby certain individuals or a group of individuals are denied the same basic, fundamental rights and freedoms, notably the freedom of association, the freedom of expression, and the freedom against discrimination, on grounds of political opinion. Thus, in the Nkumbula case,¹⁵ counsel for the appellant argued that the setting up of a Commission to work out a one-party constitution was ultra vires the Inquiries Act under which the Commission was set up, because it cannot in law be for the "public welfare" with the meaning of that Act to prepare to deprive a citizen of any of the fundamental rights protected by the existing constitution. The Court of Appeal for Zambia, of course, replied by saying that whether or not a matter is one of "public welfare" is subjectively to be decided by the President, and that that decision cannot be challenged in a court of law unless bad faith or improper motive is alleged.

ii) Other alleged motivations for the introduction of single-party systems

Apart from the argument based on national unity, there were some other isolated reasons advanced to justify the establishment of a single party in Zambia. Chief of these was the consideration of the geo-political position Zambia occupied in Southern Africa at the time of the moves to introduce the one-party state. Zambia is the only country which shares borders with the minority regimes of Rhodesia and South Africa (through Namibia/South-west Africa which it controls and rules), and with the former Portuguese territories of Mozambique and Angola. These two former Portuguese territories have now become independent (1975 and 1976, ^{respectively}). Because Zambia offered bases to the liberation movements to carry out their guerilla campaign in these territories, there has constantly been infiltration by Portuguese, Rhodesian and South African troops into Zambia, and they have carried out activities which were obviously intended to, and did in fact result in, sabotage of Zambia's strategic installations.¹⁶ In particular, Zambia depended on her southern neighbours for the importation of her ^{imports} and also for the supply of vitally needed manufactured goods, and for the supply of power to feed her industries - especially the copper mining industries.

In order, therefore, for Zambia to organize resistance to these outside, subversive attacks and for her to plan to

to save the economy from disruption by Rhodesia and South Africa, it was urged that the country needed to secure to itself a united and vigilant population under the guidance of one party and a strong executive. If a multi-party system was allowed to continue operating - with its undesirable effects of dividing people politically, the enemy would easily attempt to exploit the situation, and proceed to harm Zambia permanently. Thus, although the National Commission on the One-Party State recommended a reduction in the executive powers of the President generally and, more specifically, in his security powers,¹⁸ the government rejected this recommendation on the ground that:

"Zambia has many enemies surrounding her and therefore the implementation of the One-Party Participatory Democracy.....together with the attendant problems, require a unified command under an Executive President".¹⁹

The need for an autochthonous constitution was also frequently mentioned as one of the motivating factors in the introduction of a one-party state. This has been the view shared by many of the African states, namely the desire to see to it that any constitutional order bestowed on them must derive its authority from within these nations, and that the contents of the constitution must bear some relevance to their national sentiments and consciousness. As Professor Wheare has eloquently written of new African states:

"For some members of the Commonwealth, it is not enough to be able to say that they enjoy a system of government which is in no way subordinate to that of the United Kingdom. They wish to be able to say that their constitution has the force of law and if necessary of supreme law within their territory

"through its own native authority and not because it was enacted or authorized by the parliament of the United Kingdom - that it is, so to speak, "home-grown", sprung from their own soil, and not imported from the United Kingdom".²⁰

It is precisely within this framework of thought that the National Commission on the One-party State in Zambia perceived the need of removing all legal ties between the one-party constitution and all British legal sources. The Commission remarked that:

"We observed that Appendix 1 to the Laws of Zambia, the Zambia Independence Act and the Zambia Independence Order appeared as one document with the Constitution of Zambia. We examined these British legal documents and came to the conclusion that with the establishment of the One-Party Participatory Democracy, Zambia should no longer be tied to the British constitutional provisions in this respect. Our Constitution should stand by itself".²¹

And when the Constitution of Zambia Bill, 1973, which sought to introduce the one-party system of government was being presented to parliament, the then Vice-President, Mr. Chona, called the moment one of "great significance and historic importance", because

"As we all know, up to now we have been governed under a constitution which was enacted by the Parliament of the United Kingdom. It will be a matter of pride for us and for the whole nation to have our constitution which is more suited to our own conditions and which is more pertinent to the aspirations of our people".²²

There is therefore no doubt that within the government circles there were those who saw the moment of the introduction of a one-party state as an opportunity to remove from the political system the last vestiges of colonial imprints, and to give the new system a distinct national character and form.

Although not frequently advanced in Zambia at the time of the introduction of a one-party state, there is an argument which asserts that the one-party state is the only system of government fairly corresponding to certain traditional African styles of political system. In traditional African political systems there were no political parties, because as Nyerere argues, in the African traditional society there were no strong issues nor were there in existence private interests which would have formed the basis upon which parties could emerge to defend one or the other of those interests. Nyerere further argued that:

"The European and American parties came into being as the result of existing social and economic divisions - the second party being formed to challenge the monopoly of political power by some aristocratic or capitalist group. Our own parties had a very different origin. They were not formed to challenge any ruling group of our own people; they were formed to challenge the foreigners who ruled over us. They were not, therefore, political "parties" - i.e. factions - but nationalist movements. And from the outset they represented the interests and aspirations of the whole nation".²⁴

The thrust of the argument is that since there are, as yet, few divisions based on economic or social classes in Africa, there can only be one movement for the entire country: or as is sometimes stated differently:

"Since parties reflect class divisions, the appearance of an opposition party must be prevented in order to avoid the development of a class struggle".²⁵

C. The Mode of adopting the One-party System:
A Comparative Summary: Ghana, Malawi, Tanzania

Here we are not concerned with how the one-party state originated in countries like Kenya and Uganda where the system has never been formally established by law. In Kenya, for example, the one-party state came about as a result of a voluntary merger of existing parties and also by proscription of the opposition party, the Kenya Peoples' Union, led by Oginga Odinga. Similarly in Uganda under Milton Obote, the one-party state, though not formally established by law, was a product of a combination of defections to the ruling party and of proscription of the opposition parties.²⁶

i) Ghana

Ghana formally became a one-party state in January 1964. This came about following a referendum organized in terms of the 1960 Republican Constitution. The electorate voted overwhelmingly in favour of the government's proposal to introduce a one-party state.²⁷ Following the referendum, the constitution was amended to provide that "there shall be one National Party", which "shall be the Convention Peoples' Party".²⁸

ii) Malawi

In Malawi, the question of whether or not the country should become a one-party state was at no point put to the people for approval. True, Malawi has always had only one political party, the Malawi Congress Party (MCP). In July 1975, the government set up a Constitutional Committee, "to consider

and make recommendations with regard to the provisions of the new Constitution required to give effect to the decision that Malawi should become a Republic".²⁹ It is important to note that the Committee was never asked to consider the question of the establishment of a one-party state in Malawi. It would have appeared that the question of a one-party state was just one of those questions which the Committee considered in recommending the form the Republican Constitution was to take. Thus, among the specific questions which the Constitutional Committee answered, was:

"Will Malawi become a One-Party State under the Republican Constitution?"³⁰

To this question the Committee answered in the affirmative. The Committee submitted its proposals for the Republican Constitution to the National Convention of the Malawi Congress Party in October 1965, and these were "unanimously" accepted. The proposals were subsequently endorsed by the Malawi government as the basis of the Republic Constitution. Thus, when the Republic Constitution became operative in 1966, it also provided that:

"There shall be in the Republic after the appointed day only One National Party",

and that

"The National Party shall be the Malawi Congress Party".³¹

iii) Tanzania

Tanzania, followed by Zambia, took a completely different course in the manner of adopting a single-party system, from that adopted by Ghana and Malawi. In Tanzania the decision to introduce a one-party state was made by the National Executive of TANU. The people were not consulted upon that decision, either in a referendum or otherwise. The decision having been taken, a Presidential Commission was appointed to consider "the changes in the Constitution of Tanganyika and the Constitution of the Tanganyika African National Union, and in the practice of Government that might be necessary to bring into effect a democratic One-party State in Tanganyika". In other words, the question of the desirability of a one-party state was not open for discussion either by the Commission, or by the people. Thus, although the Commission consulted widely on the form of the new Constitution, it did not receive submissions for or against the one-party state. The recommendations of the Presidential Commission³², as approved, after amendment, by the government, formed the basis of the One-party Constitution in Tanzania. The new Constitution provided that:

"3(1) There shall be one political party in Tanzania",
and that:

"(3) All political activity in Tanzania.....shall be
conducted by or under the auspices of the Party".

The Tanganyika African National Union, TANU, and the Afro-Shirazi Party (ASP) are specifically mentioned as such

one political party respectively for Tanganyika and Zanzibar.

D. The Mode of adopting the One-Party System in Zambia

i) The National Commission on the One-Party Participatory Democracy

As indicated above, the method by which the one-party system originated in Zambia closely followed the approach in Tanzania. On the 25th of February 1972, President Kaunda announced that the Cabinet (not the party central organ, as in Tanzania) had taken a decision that the future Constitution of Zambia should provide for a One-party Democracy, and that a Commission would be set up with the task of determining the form which that One-Party Democracy should take. The Commission was duly appointed on 1st March. The general terms of reference were to "consider changes in

- (a) the Constitution of Zambia;
- (b) the practices and procedures of the Government of the Republic; and
- (c) the Constitution of the United National Independence Party",³³

necessary to bring about and establish a one-party participatory democracy in Zambia. The Commission, like its Tanzanian counterpart, was thus precluded from entertaining submissions for or against the principle of a one-party state. However, precisely because Zambia have had a strong base of opposition, it was not surprising that a number of petitioners were unable to confine themselves within the Commission's terms of reference. As the Commission stated in its Report:

"A number of petitioners did not confine themselves strictly to the terms of reference regarding the form of the One-party Democracy as such and discussed matters relating to the pros and cons of its establishment. We, however, insisted that our task was not to listen to petitioners who gave reasons for or against the establishment of the One-party system".³⁴

It is also relevant to note that the ANC President and his deputy, Mr. Harry Nkumbula and Mr. Nalumino Mundia, were appointed to the Commission, but declined to serve because of their opposition to the whole idea of creating a single-party system in Zambia.

The President had also set out a number of principles to be adhered to by the Commission in its consideration of the matter. These included the principle that "The fundamental rights and freedom of the individual shall be protected as now provided under Chapter III of the Constitution of the Republic of Zambia".

The Commission was required to investigate a number of crucial issues, including the nature of the presidency in a one-party state, the nature and structure of government in general (including the important question of the relationship between cabinet, parliament and the central committee of the party), the nature and structure of parliament in a one-party state and its relationship to party organs, especially to the National Council. The composition of the Commission was representative of people from various walks of life. The Commission also toured the country widely, collecting evidence from the people as to the form the new constitution should assume. The Commission ceased taking evidence in June, and

presented its report to the President in October 1972.

The one-party state was formally established on 13th December 1972, when the short Constitution Amendment Act,³⁵ implementing the decision, received the presidential assent.

The Constitutional Amendment stipulated that:

"There shall be one and only one political party in Zambia, namely, the United National Independence Party".³⁶

However, the government move to introduce a single-party was challenged - not only through political means, but also through a court action instituted by the opposition leader, Mr. Harry Nkumbula. The case is an important one in the constitutional history of Zambia, and merits an extended discussion in the present context, for the arguments involved pertain to the basic question of the compatibility of a single-party system with the enforceable protection of human rights.

ii) Opposition in the Courts: The Nkumbula Case³⁷

In this case, the applicant sought a declaration from the High Court to the effect that the introduction of a one-party state was "likely" to infringe fundamental rights guaranteed to the petitioner by the constitution as it existed at that time, that is to say, the right to assemble freely and associate with other persons³⁸ as a member, and as leader, of the African National Congress, the right to express and receive opinion,³⁹ and freedom from discrimination on the grounds of political opinion.⁴⁰ It was argued that these rights could

not exist or be enjoyed unhindered under a single-party system, since such a system is incompatible with such freedoms; alternatively that the introduction of a one-party state is manifestly contrary to the spirit of the Constitution.

On behalf of the petitioner it was argued that the fact that the one-party commission was enjoined to adhere to the principle that "the fundamental rights and freedoms of the individual shall be protected as now provided under Chapter III of the Constitution of Zambia" meant that the freedom of association, including the right to form political parties, would be retained even after the new Constitution was established. It therefore implied that following from this witnesses were allowed to give evidence opposing the creation of a one-party state. (Surprisingly, no argument in reply to this and many others on behalf of the State are stated in the report.) With respect to the above contention by the applicant, Doyle, C.J., who handled the case in the High Court, observed that:

"Quite clearly, S.23 in its existing form would be inconsistent with the notion of a one-party state in that at present it guarantees freedom of association, including by implication power to form political parties".⁴¹

However, his Lordship considered that the principle referred to by the President regarding the retention of a bill of rights in the proposed constitution was "merely a guiding

factor in considering the approach to the form of a One-party State", and that the reference to that principle did not mean "that S.23 must be rigidly adhered to in its present form". It was the Court's view that it would be outside the Commissioner's terms of reference to allow witnesses airing their views either for or against the proposal to create a one-party state. In any case, the Court observed, the petitioner was at liberty to put forward his views in public or in private in support of, or against, the one-party state. That he could not put forward particular views before a Commission set up to deal with certain matters was no restriction upon his freedom.

The petitioner further argued that his freedom of expression was likely to be infringed because there was an authoritative statement by or on behalf of the Government of Zambia inhibiting any expression of opinion against the introduction of a one-party state. The basis of this claim referred to the statement made by the district governor for Lusaka, Mr. Justin Kabwe, that "UNIP was ready to crush anyone who opposed the formation of a one-party state", and that "Whether people liked it or not, the one-party democracy had come to stay in Zambia". Meanwhile, Doyle, C.J., conceded that if the petitioner succeeded in showing that the Government of Zambia did take steps or threatened to take steps in furtherance or pursuance of its decision to introduced a one-party state, and if it could be shown further that such steps would be likely to infringe his rights under the Constitution

before its amendment, "that would be contravention of S.22 of the Constitution, and the petitioner would be entitled to redress". But were the utterances or verbal intimidations by Governor Justin Kabwe such a step? While deprecating the "somewhat extravagant language" in which Mr. Kabwe's statement was couched, the High Court held that "an isolated statement by a comparatively ^{junior} official" could not be said to be official government policy; on the contrary, the evidence showed that the petitioner had freely expressed his opinion against a one-party state in a television interview, and at a large rally in Lusaka which he addressed.

The last declaration asked for by the petitioner was that the introduction of a one-party state was contrary to the spirit of the Constitution. Doyle, C.J., started considering this question with the assertion that:

"I have no doubt that the introduction of a One-party State will prohibit the formation of political parties, and that it will be a restriction on the present rights of assembly contained in S.23. In that sense it is inconsistent with the present constitution".

There is an inherent difficulty in the petitioner's argument on this ground. In the first place there was no evidence that under the then Constitution any action was to be taken to prevent the formation of political parties. The prevention was only to take place after the Constitution was amended - and the amendment would obviously involve alteration of S.23, restricting rights of assembly by different political parties. What the government did was no more than to make a declaration

of its intention to introduce legislation in parliament to amend the constitution, for the purpose of creating a one-party state. By law the government possessed the right and power to amend the Constitution for any purpose - including an amendment to the bill of rights as long as the prescribed majority in parliament was secured. Surely a mere prior announcement of an intention to exercise that right and power cannot be challenged as likely to infringe rights under the Constitution. And when the right and power had been exercised, and a one-party state has been created, the rights alleged to have been infringed would have disappeared with the coming into effect of the amendment. In the event, the petitioner would no longer have those rights.

On appeal to the Court of Appeal for Zambia (before Baron, J.P., Hughes, J.A., and Chomba, A.J.A.) the arguments took a completely different line. In the first place it was argued that the setting up of the Commission could not be "for the public welfare" within the meaning of the Inquiries Act⁴² under which the Commission was appointed, because "it cannot in law be for the public welfare to prepare to deprive a citizen of any of the fundamental rights protected by the existing Constitution". The Inquiries Act vested in the President a discretionary power to appoint a Commission to "inquire into any matter in which an inquiry would, in the opinion of the President, be for the public welfare".⁴³

This clearly made it a matter for the subjective decision of the President to say which subjects were "for the public welfare", calling for an inquiry by a Commission. The exercise of such a power, under the usual administrative law, was beyond challenge in a court of law, unless it was alleged that the President acted "in bad faith or from improper motives or on extraneous consideration or under a view of facts or law which could not reasonably be entertained".

But whether in setting up the Commission the President had acted on a view of the facts or the law which could not reasonably be entertained would turn on the description of "public welfare". In the view of the petitioner, public welfare meant the welfare of the individuals comprising the public, so that to derogate from individual rights and freedoms cannot be for their welfare. This, the Court refused, holding that the meaning of the "public" in the context of the Inquiries Act "is the community in general, as an aggregate, the people as a whole". Thus, in the opinion of the Court,

"What is in the public interest or for the public benefit is a question of balance; the interest of the society at large must be balanced against the interests of the particular section of society or of the individual whose rights or interests are in issue, and if the interests of the society are regarded as sufficiently important to override the individual interests, then the action in question must be held to be in the public interest or for the public benefit".

Accordingly, the setting up of the Commission was within the powers of the President under the Inquiries Act and therefore lawful.

On the second ground of appeal the petitioner argued that the Court below had erred in law in holding that his rights had not yet been infringed unless and until the Constitution was amended, and the one-party state established. It was asserted that the petitioner does not have to show that his rights under the bill of rights after the introduction of a one-party state are likely to be contravened in relation to him, but that it is sufficient for him to show that the introduction of a one-party state will infringe his rights under the Constitution in the present form: this approach, the argument further asserted, accords with the words in Section 28⁴⁴ of the Constitution: "is likely to be". The Court, however, noted that under Section 28(5), no application can be brought to the High Court under Section 28(1) on the grounds that any guaranteed right under the bill of rights was likely to be contravened by reason of proposals contained in a bill which has not, at the time of application, become a law. The existence of this provision makes it clear that if the only step taken by the executive is the introduction of the bill, the enforcement procedure under S.28(1) of the Constitution cannot be invoked. Baron, J.P., then concluded that:

"In my judgment, therefore, Section 28(1) has no application to proposed legislation of any kind, far less to a proposal to amend Chapter III itself..."

In holding thus, the Court of Appeal was merely confirming the view of Doyle, C.J., in the Court below that, for an applicant to have locus standi to seek redress under

Section 28(1), it is not sufficient to plead a mere declaration of intention by the Government to introduce legislation in future, but that the applicant must be able to show actual or threatened action by the executive in violation of his rights. Since in the Nkumbula case, the appellant failed to show that the executive or any of his administrative officers had taken some action in relation to him in the sense described above, or that any such action was threatened to be taken, Section 28(1) was not successfully invoked.

The decision in the Nkumbula case may be compared with the Sierra Leonean case of Steele and Others v. Attorney-General⁴⁵ decided by the Supreme Court for Sierra Leone in 1967. Interestingly, although this was also a case challenging the constitutionality of the government's plan to introduce a one-party state, it was never cited in the Nkumbula case. The initial point must be made here that the Constitution of Sierra Leone is, or was, in many respects similar to that of Zambia, with a justiciable bill of rights protecting individual rights and freedoms. In its 1965-66 session, the Parliament of Sierra Leone passed a resolution to the effect that "Government give serious consideration to the introduction of a One-Party System of government in the country". Consequently, the government issued a White Paper on the "Proposed Introduction of a Democratic One-Party System in Sierra Leone". In this Paper the government set down its views about the subject, and also set out some proposals about what type of the one-party system it wanted to introduce. The White Paper

then concluded:

"In making these proposals Government will endeavour to ensure that no person in Sierra Leone is deprived of his fundamental rights to life, liberty, security of his person, the enjoyment of property and the protection of the law, his fundamental freedoms of conscience, of expression and of assembly, and respect for his private and family life".⁴⁶

A One-Party Committee was then set up by the government, with the following terms of reference:

"To collate and assess all views on the One-Party System both in and out of Parliament and to make recommendations on the type of One-Party System suitable for Sierra Leone and the method by which it should be introduced".⁴⁷

As in Zambia, the Committee in its consideration of this matter was to take into account the government's view that fundamental rights and freedoms must be retained in the proposed system, together with other principles, such as the maintenance of the rule of law and the independence of the judiciary.

It was from this background that the dispute in the Steele case arose. The plaintiffs in this case brought an action under Section 24(1) of the Sierra Leonean Constitution which, like Section 28(1) of the Zambian Constitution, sets out the provisions for the enforcement of the guaranteed rights, and reads as follows:

"24(1) Subject to the provisions of Subsection (6) of this Section, if any person alleges that any of the provisions of Sections 12 to 23 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress".

The claim of the petitioners was that the appointment of a One-party Committee by the Government constituted and was a threat to, or infringement of, the constitutional provisions contained in Sections 12 to 23 (inclusive) of the Constitution, and was specifically in breach of Section 22 guaranteeing freedom of assembly and association, including the right to form and belong to any political party. Cole, C.J., viewed the construction of Section 24(1) in the same way as did Baron, J.P., in the *Zambian* case. The Chief Justice observed that:

"What does S.24(1) of the Constitution mean? This question is relevant because it is my view that on a proper reading of S.24(1) of the Constitution, the plaintiffs-respondents must allege material facts on which they rely to show that any of the provisions of SS.12 to 23 (inclusive) of the Constitution has been, or is being, is or likely to be, contravened in relation to them. In my considered opinion, what the section means is this: To entitle a person to invoke the judicial power of this Court, that person must show by allegations of material fact in his pleadings that as a result of the legislative or executive acts complained of he has sustained, or is sustaining, or is immediately in danger of sustaining, a direct injury, and this injury is not one of a general nature common to all members of the public". 48

Unlike in the *Zambian* case, the petitioners in the *Sierra Leonean* case did not allege infringement of the freedom of expression since the government, although it had decided to introduce a one-party state, did not prohibit people from expressing their views for or against the decision, in this respect the government had categorically stated that:

"Any changes in our political system which are proposed, will only be brought about if the people agree to them, after being consulted by a method which is both constitutional and popularly acceptable". 49

But like in the case of Zambia, what the Sierra Leonean government did was merely to set up a Committee with the task of considering what form of constitution would be suitable to give effect to the introduction of a one-party state. There was therefore no question of having taken a positive step in the form of introducing legislation to bring about the single-party state. It is therefore interesting to note that the sort of issues which arose in the Nkumbula case did not arise in the Sierra Leonean Steele case. This may be explained on the ground that in Zambia the government in setting up the One-party Commission did so through a statutory instrument made pursuant to an Act of Parliament - the Inquiries Act. The setting up of the One-party Commission was made pursuant to this statutory instrument which the applicant challenged as invalid because of its alleged contravention of certain constitutional provisions guaranteeing the freedom of expression and the freedom of association and assembly in particular. In Sierra Leone, on the other hand, the setting up of a Committee for the purposes of introducing a One-party State was done merely through the passage of a parliamentary resolution and no legislation of any kind was ever passed for that purpose.

The decisions in these two cases, but especially in the Zambian case, provide good examples of the nature of problems that courts frequently face when dealing with cases in which the political factor is centrally significant. What the Court was asked to pronounce on in the Nkumbula case was to declare that the government's plan or policy to bring about what it considered to be the best form of political system for the country was unlawful and therefore

null and void. It amounted to something like saying that the government did not have power to impose restrictions on individual liberties. Surely if the Courts were bold enough to hold just that, this would have aroused a serious uproar of political controversy between those who consider themselves representatives of the people on the one hand, and the Courts on the other. But, as Baron, J.P., remarked in the Nkumbula case:

".....it is unthinkable to suggest that the government of a country elected to run an ordered society is not permitted to impose whatever constitutional restrictions on individual liberties it regards as necessary to enable it to govern to the best advantage for the benefit of the society as a whole".

It was in predictions of this kind of possible clash between the executive and the judiciary that the Presidential Commission on the Establishment of a Democratic One-party State in Tanzania, partly based its argument, it will be recalled, for the omission of a bill of rights in the proposed one-party constitution for Tanzania.

In a situation such as that which arose in Zambia, how much justified the applicant's case would have been in law, it is questionable whether a judge presiding over the case would find against the government. He has no choice except to find some way out of the controversy by presumably putting up some learned arguments and rationalizations to justify his findings in favour of the party and government. This is what we may term here as "constructive bias" by the judiciary in favour of the government: it is "constructive" because at least it has the merit of avoiding an unnecessary conflict between the Court and the executive. This

also ensures that the administration of justice would not be adversely affected by the ensuing political controversy.

E.) Provisions Made for Human Rights in the One-party Constitutions of Ghana, Tanzania and Malawi

It has already been stated at the beginning of this chapter, that the one-party constitutions devised for Ghana (1964), Tanzania (1965) and Malawi (1966) did not incorporate bills of rights: indeed, in Tanzania and Malawi the issue whether or not to incorporate a bill of rights in their respective one-party constitutions was extensively discussed, and in each state the idea was rejected. In the light of this development, this section investigates the reasons adduced for the rejection of the bill of rights, and secondly, discusses the alternative means to the protection of human rights in the absence of a bill of rights in these countries.

i) Ghana

In Chapter Two we indicated that, at the time when Ghana became independent (1957), bills of rights in the Commonwealth were not generally accepted as the best constitutional techniques for limiting governmental powers - the Anglo-Saxon scepticism towards constitutional affirmations of human rights, it was explained, had first to be overcome. Thus, Ghana's independence constitution of 1957 did not incorporate a bill of rights, and this continued when Ghana's Republican Constitution again omitted a bill of rights. The only reference to human rights to be found in the Republican Constitution of 1960 was in connection with a "declaration"

which the President was required to make on his assumption of the office of Presidency. In that declaration the President was called upon to declare adherence to a number of "fundamental principles", which included the principles that:

".....freedom and justice should be honoured; that no person should suffer discrimination on grounds of sex, race, tribe, religion or political belief; that chieftaincy should be guaranteed and preserved; that every citizen of Ghana should receive his fair share of the produce yielded by the development of the country; that subject to such restrictions as may be necessary for preserving public order, morality or health, no person should be deprived of freedom of religion or speech, of the right to move and assemble with hindrance or of the right of access to courts of law; that no person should be deprived of his property save where the public interest so required and the law so provides....."⁵⁰

The constitution then purported to entrench this article by providing that "the power to repeal this Article, or to alter its provisions otherwise than by the addition of further paragraphs to the declaration, is reserved to the people".⁵¹ Thus when the single-party form of government was introduced in Ghana in 1964, this declaration remained in the Constitution, which was merely amended to provide for the one-party state. No debate whatsoever ensued on the crucial issue of whether or not it was desirable to incorporate a bill of rights in the one-party constitution of Ghana - in contrast to Tanzania and Malawi. Thus it was that Ghana's one-party constitution did not include justiciable guarantees of individual rights and freedoms.

As regards the presidential declaration itself, the question of its justiciability was decided by the Supreme

Court of Ghana in the case of re. Akoto and 7 Others.⁵²

This case was important in that it decided whether, by reciting the "fundamental principles" embodied in the presidential declaration and enjoining the President to declare his adherence to them, the Constitution had conferred upon them the character of legally enforceable rights operating to limit the powers of parliament. In this case, the appellants were arrested and placed under detention pursuant to an order made by the Governor-General and signed on his behalf by the Minister of the Interior under Section 2 of the Preventive Detention Act, 1958. It was argued on behalf of the appellants that the Preventive Detention Act, 1958, by virtue of which the detention orders were executed, was contrary to the solemn declaration of fundamental principles made by the President on assumption of office. The Court dismissed as "untenable" the suggestion that the declarations made by the President on assumption of office constitute a "Bill of Rights" in the sense in which the expression is understood under the Constitution of the United States of America.⁵³ The Court then went on to explain the legal nature of the declaration thus (per Korsah, C.J.):

"It will be observed that Article 13(1) [i.e. the Article providing for the 'declaration'] is in the form of a personal declaration by the President and is in no way part of the general law of Ghana. In the other parts of the constitution where a duty is imposed the word "shall" is used, but throughout the declaration the word used is "should". In our view the declaration merely represents the goal which every President must pledge himself to attempt to achieve. It does not represent a legal requirement which can be enforced by the Courts.

"On examination of the said declarations with a view to finding out how any could be enforced we are satisfied that the provisions of Article 13(1) do not create legal obligations enforceable by a court of law. The declarations however impose on every President a moral obligation, and provide a political yardstick by which the conduct of the Head of State can be measured by the electorate. The people's remedy for any departure from the principles of declaration is through the use of the ballot box, and not through courts".⁵⁴

Clearly this decision confirmed the assertion that the President in Ghana was free to assent to any Bill, even if this derogated from any of the principles embodied in the "declaration". This was rather surprising in the context of the Ghanaian constitutional arrangement since, apart from this Article on the "declaration", there was no other incidence in the Constitution, or indeed in any ordinary legislation, expressly protecting individual rights and freedoms and providing for some machinery to deal with executive encroachment of these rights. In other words, under the Republican/One-party Constitution of Ghana, there was no formal arrangement whereby an individual whose rights have been violated by the executive could challenge the latter's action either before the Courts, or before some form of a tribunal, or any sort of body - in order to obtain a remedy. The executive was left to run the affairs of the government almost uncontrolled. It is partly due to the absence of adequate constitutional and other safeguard on the resultant power structure under the Ghanaian Presidential/One-party Constitution of 1960-6 that accounted for the rule of tyranny and oppression in Ghana under President Kwame Nkrumah.⁵⁵

"The executive President in Ghana, 1960-66 ", comments

Nwabueze:

"had progressively gathered to himself the supreme power in the state, erecting himself above the legislature and the party, and had then proceeded to use this absolute power to tyrannize and oppress people by a systematic desecration of their civil liberties".⁵⁶

Not surprising, it was in the area of personal liberty that these powers had the greatest impact, and the main instrument through which personal liberty in Ghana was under constant erosion was the Preventive Detention Act, 1958. Under this Act the President could detain persons in both normal and emergency times. When the Act was enacted, it was announced as a temporary measure - to expire after five years. However, the Act had been re-enacted and established on a permanent basis until it was repealed after the army coup in February 1966.

Since its introduction in 1958, the Act had been extensively used and many opposition leaders and dissidents were detained, including some former cabinet ministers who were allegedly implicated in a plan to assassinate President Kwame Nkrumah. It has been estimated that since 1961 over 1,000 Ghanaians were detained under the Preventive Detention Act for periods ranging up to ten years in conditions of severity worse than those laid down by law for convicted prisoners.⁵⁷ Unlike the detention legislation of some other African countries, the Ghanaian legislation never prescribed any rules which could be described as "minimum safeguards" to protect detained persons. The requirement to publish

detentions in the official gazette, though it existed initially, was discontinued; the executive was under no duty to communicate grounds for detention to a detained person, and no review of detention by any person or body was ever instituted. The late Dr. Busia, an ardent opponent of Nkrumah's rule, and later on Prime Minister of Ghana, singled out five objectionable features of the Preventive Detention Act, namely that:

- "a) the.....Act empowers the President, solely in his discretion, to deprive any subject of his liberty, virtually for life;
- b) the Ghana Courts have held that the discretion is absolute;
- c) the President in the exercise of this absolute discretion is not answerable to Parliament, or any court or tribunal;
- d) the person detained is denied the elementary, natural justice of facing his accusers or putting his case;
- e) there is no provision or protection whatsoever against the indiscriminate abuse of the powers conferred by the Act".⁵⁸

The use made of the Preventive Detention Act was so drastic in extent that it attracted the attention of the International Commission of Jurists which undertook a study of that Act. The findings of the Commission confirmed the validity of Dr. Busia's criticisms. The Commission concluded:

- ".....there are certain factors in connection with the Ghana Act which, from a legal point of view, are not satisfactory.
- i) The maximum duration of the preventive detention seems long especially when it is taken into account that there is no indication that the term of detention comes up for regular review by the executive.....

- ii) On account of the inability of the detainee to face his accusers and put his case there appears to be an infringement of a rule of natural justice.....
- iii) There is no independent tribunal before whom the detainee can make his objection.
- iv) Because of the narrow subjective interpretation of the words "if satisfied", the Courts have precluded themselves from investigating the grounds of the President's satisfaction. Judicial review, therefore, does not seem to have provided in Ghana a strong safeguard for the liberty of the subject".⁵⁹

From these accounts, it will be seen that the re-enactment and further use of the Act in the one-party state after 1964 even worsened the position in Ghana, for it meant that the personal liberty of the subjects of Ghana was further eroded, since now the President had control over both Parliament and the judiciary;⁶⁰ for one of the proposals that had been submitted at the referendum which sought a mandate to introduce a one-party state in Ghana, was that the President should be empowered to dismiss judges of the Superior Courts "for reasons which appear to him sufficient". In March 1964, barely three months after the introduction of a one-party state, three judges from the Supreme Court and one from the High Court were dismissed.⁶¹ The actual operation of human rights in a one-party state, including that of Ghana, will be discussed at a later stage in this work, but suffice it here to observe that in Ghana, no serious attempt was ever made to subject the one-party government to some form of legal or even political control mechanisms specifically devised to project individual grievances in respect of alleged violations of personal liberties by public officers or agents. These legal control mechanisms need not be in the form of a constitutional bill of rights, but some form of institution

specifically charged to act as a watchdog against infractions of individual rights and freedoms by the various arms of the executive and the legislature was surely needed. In this respect, the Ghanaian constitutional arrangements, especially in relation to the provision made for the protection of human rights, stand in increasing contrast to those of Malawi and Tanzania, although Malawi perhaps comes next in terms of the deficiency of provision for the protection of human rights.

ii) Malawi

When Malawi, formerly the British Protectorate of Nyasaland, was granted internal self-government in 1963, a bill of rights was included in the Constitution.⁶² This bill of rights was also carried over into the independence constitution of 1964.⁶³ This document was, however, discarded when the Republican/One-party Constitution was finally enacted in 1966. This was indeed expected, since even the original inclusion in the constitution of 1963 was accepted by the Malawi Government "with considerable reserve".⁶⁴

The rejection of a bill of rights as part of the Republican Constitution was actually recommended by the Constitutional Committee set up by the government to consider and recommend what type of constitution would be suitable for Malawi as a republic. The Committee in its report observed that:

".....the inclusion in the Constitution of a written declaration of the natural rights and liberties to be enjoyed by any portion of the community is worthless unless the preservation of these rights is reflected in the genuine wishes of the people as a whole. In a democratic state laws depend for their ultimate authority upon the desire of the people to see them enforced, and it was felt that it was the duty of a responsible government to guide and tutor the people in the appreciation of the benefits of fair and impartial laws, rather than arbitrarily to impose constitutional protection for minorities which are valueless unless they enjoy popular understanding and acceptance".⁶⁵

This argument seems not to take into account the fact that Bills of Rights are not only devices for the protection of minorities, but, more important, they are intended to ensure that the rights and liberties of the people as a whole are sheltered against arbitrariness by the agents of the state. However, the government based its objection for the inclusion of a bill of rights in the new constitution on three grounds. Firstly, it was argued that the laws of the country already provided an elaborate code for the protection of individual rights against either private or public interference. Secondly, it was also said that since Malawi now became (upon the attainment of a republican status) a full member of the United Nations, it will be ^{committed} to the observance of the United Nations' Declaration of Human Rights.⁶⁶ The final objection advanced was that the presence of a bill of rights in the constitution, coupled with a provision for the enforcement of these rights in the courts, would only invite unnecessary and harmful conflicts between the executive and the judiciary.

In place of a bill of rights, the Constitutional Committee recommended that there be incorporated in a preamble to the constitution, a declaration of the fundamental principles of government. The recommendation of the Committee was duly implemented.

When the Republican Constitution of Malawi finally came into operation in 1966, it incorporated six "fundamental principles of government",⁶⁷ of which three are relevant to the present investigation. The first of these state that: "No person should be deprived of his property without payment of fair compensation, and only where the public interest so required", the second asserts that it is "the paramount duty of the Government to safeguard and advance the interests and welfare of the Malawian people", and finally, the third principle states that "the Government of Malawi and people" recognize "the sanctity of the personal liberties set out in the United Nations' Charter of Human Rights". In 1968, the Government passed a Constitutional amendment,⁶⁸ which added to these provisions by enacting that, "nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of [the declaration of principles] to the extent that the law in question is reasonably required in the interests of defence, public safety, public order or the national economy".⁶⁹

As to the question of the justiciability of the basic principles of government enshrined in the Malawian Republic Constitution, it has been held by eminent constitutional

lawyers that the principles cannot form the basis upon which a legal action can be founded. In other words, under the Malawi Constitution there is nothing in the nature of a scheme specifically devised to ensure the protection of the rights and freedoms of the citizens. In this respect the Malawian constitution is akin to the Ghanaian one; in fact it has been claimed that the Republican/One-party Constitution of Malawi drew heavily for its inspiration upon the Ghana Constitution of 1960.⁷⁰ On the other hand, the Tanzanian scheme, though also lacking a formal bill of rights, differs markedly from those of Malawi and Ghana in the way the scheme places emphasis on individual rights and freedoms.

iii) Tanzania

Tanzania, alongside Ghana and Malawi, as indicated already above, rejected incorporation of a bill of rights in its One-party Constitution of 1965. (Tanganyika had also rejected a bill of rights in its Independence Constitution of 1961.)

The Presidential Commission on the Establishment of a Democratic One-party State, which was appointed by the Government of Tanzania and which was charged with the task of recommending an appropriate constitution necessary to bring into effect a one-party state in Tanzania, considered at length the issue of whether or not a bill of rights was an effective means to protect the rights of the individuals in the circumstances of Tanzania - particularly in the

context of a one-party administration: "In making our recommendations to the institution of government appropriate to a one-party state", the Presidential Commission avowed, "we have had constantly in mind the need to ensure that any new arrangements we propose will not unnecessarily ^{encroach} on the freedom of the individual".⁷¹ However, the Commission felt that this cannot be realized through the mere incorporation of a bill of rights in the Constitution which, "in the circumstances of Tanganyika today" would be "neither prudent nor effective".⁷² A number of plausible arguments were adduced by the Commission to justify its verdict. We first state these arguments before commenting on their validity in the circumstances of a new nation like Tanzania:

- a) In the first place it was argued that Tanganyika was still a young nation which lacked a "long tradition of nationhood" and also lacked a strong basis of internal national security. As such it was exposed to disruption by a handful of disgruntled individuals. In these circumstances, a bill of rights would be disadvantageous because "it limits in advance of events the measures which Government may take to protect the nation from the threat of subversion and disorder".⁷³
- b) In the second place it was argued that a bill of rights once included in the constitution would invite conflict between the judiciary and the executive and legislature. This is self-evident since the presence of a bill of rights in the constitution would naturally be coupled with a provision requiring the Courts to declare invalid

any law passed by parliament or any executive action if it were inconsistent with a provision contained in a bill of rights. "By requiring the Courts to stand in judgment on the legislature", the Commission argued, "the judiciary would be drawn into the arena of political controversy",⁷⁴ - and this could have damaging effects on the administration of justice by the Courts.

- b) In the third place, the Commission raised the objection that Tanganyika intended to initiate "dynamic plans for economic development" along socialist lines, and that the implementations of these plans would require relaxation of some of the inhibitive provisions in the bill of rights on the power of the state.⁷⁵ As the Commission put it:

"Decisions concerning the extent to which individual rights must give way to the wider considerations of social progress are not properly judicial decisions. They are political decisions best taken by political leaders responsible to the electorate".⁷⁶

The Commission further stressed that the rights of an individual in any society depend more on the ethical sense of the people than on the formal guarantees in the law - as the British constitutional tradition has always demonstrated.

There is no doubt that the foregoing reasons advanced by Tanzania in rejecting incorporation of a bill of rights in its one-party constitution were indeed powerful and convincing. In the first place, it must be remembered that the paternity of human rights is, as already indicated in the first chapter, the European Convention "which is replete with liberal and laissez-

faire philosophy and may be appropriate for the advanced economies and more stable political conditions of Western Europe".⁷⁷ But can the same code of human rights be suitable for a developing fragile polity, avowedly committed to the implementation of economic development plans? In a newly-emerged state there are far more points or areas of conflict among the people themselves or among a section of the population against the government.

Thus the need to invest sufficient power in the state to deal with any possible danger which would threaten the security of the country. This is the thrust of the first argument adduced by the Presidential Commission, as recounted above. However, this argument falls short of persuasion, since almost all of the rights and freedoms guaranteed under the bill of rights can be qualified in the interests of defence, public order, public safety, etc., as is the case under the Zambian Constitution. In the Zambian case of Kachasu v Attorney-

General, which we have already referred to, the High Court of Zambia upheld the argument of the state that a law or measure taken under it derogating from a guaranteed right under the constitution in the interests of national security, was "reasonably justifiable in a democratic society".⁷⁸

In the second place, all African Commonwealth states do possess to themselves adequate power and authority under the various security and emergency legislations to take all necessary action for the purposes of dealing with any threat to national security or public order or any form of subversion.

As regards the argument that a bill of rights in fact has the effect of imposing restrictions on the power of the state in the implementation of the needed socialist development programmes, one has only to take the Zambian experience to justify the validity of this assertion. We have noted in the last chapter that the independence constitution handed over to Zambia left the nationalist government legally powerless to nationalize certain privately owned assets which were vital to the economic survival of Zambia. The Government of Zambia had therefore to revise the colonially-inherited provisions relating to the protection of property rights in order to permit implementation of its economic development plans. Thus, a bill of rights can prove inhibitive on the ambitions of a new nation anxious to push through development projects to induce social and economic progress.

The interesting point, however, about the rejection of a bill of rights in Tanzania is that this seems to be the exclusive idea of the Presidential Commission which was, no

doubt, influenced by the previous precedents of omission of a bill of rights after the Independence and Republican Constitutions of 1961 and 1962 respectively. This is confirmed by the fact that, within Tanganyika during the time when the Commission was taking evidence from people about the new constitution, there was a certain section of the population in favour of the inclusion of a bill of rights as an integral part of the new constitution. The memoranda submitted to the Commission by the Tanganyika Law Society,⁷⁹ through its President, urged for a constitutional incorporation of human rights. In the words of the memoranda:

"A provision should be incorporated in the Constitution stating that all laws which are repugnant to or inconsistent with or take away or abridge the fundamental rights are null and void".⁸⁰

The rights and freedoms which the Society considered should have been incorporated in the Constitution were those which in the first place, are found in other Commonwealth African constitutions - that is, "the right to life; freedom from inhuman treatment; freedom from slavery; the right to liberty; the right to property; freedom of expression; freedom of peaceful assembly and association; freedom of worship; and freedom from discriminatory legislation".⁸¹ In addition, "cultural and educational rights" were also included in the list of the traditional civil liberties. It will be difficult to see how cultural and educational rights, if incorporated as part of the bill rights, would have been enforced through the Courts, which, the memoranda said:

".....must have unfettered power to safeguard and enforce the rights guaranteed under the Constitution; and to this end, the.....remedies such as the writs of habeas corpus, certiorari and mandamus, etc., available under all democratic legal systems, should also be available here [i.e. in Tanganyika]".⁸²

There was nothing in the Presidential directives to the Commission which suggested that a bill of rights was not the appropriate device to protect the rights of citizens in one-party Tanzania. If anything, President Nyerere, in his document entitled "National Ethic", circulated to members of the Commission to assist them in their task, enumerated all the known traditional civil liberties - freedom of expression, of movement, of religious belief, of association, equality before the law, property rights, freedom from arbitrary arrest, etc., which he said ".....lie at the basis of the Tanganyika nation, and the whole political economic and social organization of the state must be directed towards their rapid implementation".⁸³ Here it is not claimed that the Tanganyikan leadership was necessarily thinking of the inclusion of a bill of rights in the Constitution as the best method to guarantee those rights, but rather that there was scope for the Commission to recommend the adoption of a bill of rights, and there was no reason why such a recommendation could not have been accepted by the government.

Apparently a bill of rights was feared because the Commission felt that it would "have the effect of limiting actions of the Government and Party", not necessarily in relation to individuals, but to "the task of nation-building".

Thus, in recommending an alternative mode for the protection of individual rights, the Commission looked to a safeguard which would not have the restrictive effects on the actions of the Government and Party.⁸⁴

What the Commission recommended as an alternative to a bill of rights was that the one-party constitution should provide for the establishment of an institution to be known as the "Permanent Commission of Enquiry", whose members should be appointed by the President. The Commission was to have a wide jurisdiction to enquire into allegations of abuse of power by officials of both government and party alike. This Tanzanian "Ombudsman"-like scheme is discussed in some detail at a later stage, where it is compared with its Zambian counterpart - the "Commission for Investigation". However, suffice it here to make the point that the device does not, to a considerable degree, serve the same purpose and function as a bill of rights. Institutions like the "PCE" or "CI" are devised with the purpose of providing some means of sheltering individuals from administrative abuse of power or arbitrariness. They are not instituted to check the actions of the government in the sense that if it found an executive or legislative action violative of any of the stated individual rights and freedoms, it could declare those actions unlawful and therefore null and void, as does a court of law. The clear dichotomy that exists between the functions of an "Ombudsman" and that of a bill of rights is confirmed by the fact that both institutions are provided for in the Zambian One-party

Constitution of 1972. It is therefore paradoxical to speak, in the context of Tanzania, of the "PCE" as an alternative to a bill of rights. In fact, what the Tanzanian scheme for the protection of individual rights was intended to achieve, as indicated above, was the result that the government must be left free from the inhibitive or restrictive effects of a legally enforceable bill of rights. This fact is further confirmed by the fact that the new Constitution of 1965, which formally established a one-party state in Tanzania, confined all reference to human rights to a preamble. The preamble to the "Interim Constitution" of Tanzania recites as "inalienable" and as "the foundation of freedom, justice and peace; life, liberty, security of person, property, the protection of person, freedom of conscience, expression, assembly, association and privacy of family. But, as stated elsewhere in this work," a preamble forms no part of a statute, and so can create no legal rights or obligations, though admittedly its spirit may be a guide in the interpretation of the substantive provisions.⁸⁵

From this it follows that the recital in the Tanzanian preamble embodying human rights can only play "a moral and an educative role" - a way of trying to "entrench the national ethic in the moral imagination of the people", as the framers of the constitution viewed it: or again, that the "national ethic" enshrined in the preamble represents ".....a consensus between the people and their leaders about how the process of Government should be carried on".⁸⁶

However, the framers of the Tanzanian Constitution recognized that mere recital in a preamble is not enough, and that in addition "everything possible should be done to win for these principles a strong commitment from the citizens".⁸⁷

The subject of the provision of human rights in the Tanzanian one-party constitutional scheme having been reviewed, something brief should now be said about how it compares to other one-party schemes in terms of effectiveness in the protection of human rights. Thomas Frank summarizes the issue well when he concludes that:

"The broad declaration of principle in the preamble to the Tanzanian Constitution perhaps conveys a more meaningful description of a democracy to the average citizen than the rather legalistic Nigerian provisions..."⁸⁸

In the circumstances of African states, perhaps this assertion conveys a lot of truth. There is a very low educational level in the vast majority of the African societies, with the result that a large number of the citizens are often ignorant about the whole idea of individual rights enshrined in the constitution and when and how to assert the them in the Courts, even if they have been infringed in relation to them. Secondly, the judicial process itself is too technical for a vast number of people to understand, and in any case, many people live far away in the rural areas, and hence have to travel long distances to come to the Courts in the urban areas. Thirdly, in any case, many people are poor, and even in getting the basic requirements of life like food, clothes or shelter they will

have to struggle for them: hence, they cannot possibly be expected to meet the huge expenses and costs involved in court litigations. There are thus structural and procedural problems inherent in the machinery of justice through the ordinary Courts. which we also fully discuss in the following chapter.

From what is stated above, it could be argued that unlike the ideal conditions present in the advanced countries of the West where people understand their rights, know how to go about enforcing them when violated in relation to them; and are economically in a far better position to meet the litigation expenses - in less-developed countries it is a case of looking to a different set of institutions and methods in the enforcement of the rights of people which would be understood by the people and would be utilized and appreciated by them. Provided the government and party is serious enough to see the ideals stated in the preamble to the constitution to be translated into practice, there is no reason why this new approach to the attainment of respect for individual rights should not deliver goods. Perhaps this is what Thomas Frank means, or implies, in the quotation above.

F) Retention of a Bill of Rights in the Zambian One-party Constitution, 1972.

As stated already, Zambia presents the only case in Commonwealth Africa where a bill of rights exists as a substantive component of the one-party constitution.⁸⁹

In this section we briefly explain how and why this situation was brought about. In the second place, a critical appraisal is attempted of whether the guaranteed rights under the bill of rights (or most of them) are capable of existing within a one-party state.

It will have been noted from the preceding paragraphs that in Tanzania and Malawi - but not in Ghana - the introduction of a one-party state was accompanied by the promulgation of new constitutions which were fundamentally different from their predecessors. The position was, however, different in Zambia where the introduction of a one-party state was originally effected through an amendment to the Republican Constitution, while the latter preserved its structure and its formal contents. Hence the Zambian conception of establishing the one-party state did not incorporate the desire to do away with the Republican Constitution completely. On the contrary, it was the wish of the government to retain, wherever possible, the institutions already existing under the Republican Constitution. The terms of reference to the National Commission confirmed this when it stipulated that its assignment was "to consider the changes in the (a) Constitution of the Republic of Zambia,...." necessary to bring about and establish the one-party participatory democracy in Zambia. A bill of rights had been a fundamental feature of the Zambian Constitution since 1965 and had probably won more acceptance and appreciation by the people of Zambia and of some of its progressive leaders than was the case in Malawi or Tanzania. In Ghana the fact

that the one-party state was not followed by promulgation of a new constitution, but was effected through an amendment to the Republican Constitution of 1960, which did not have a bill of rights, meant that no issue of the suitability of a code of human rights in a one-party state could, in fact, ever arise.

In the second place, unlike again the circumstances in Tanzania and Malawi, in Zambia the National Commission was expressly directed by the President to "pay due regard and adhere to" some nine principles "as cardinal, inviolable and built-in safeguards of One-party Participatory Democracy". Two of these principles are relevant to the present discussion, namely (i) "that the supremacy of the rule of law and independence of the judiciary shall continue to be maintained"; and (ii) that "the fundamental rights and freedoms of the individual shall be protected as now provided under Chapter III of the Constitution".⁹⁰ In other words, the National Commission was precluded from considering whether or not a bill of rights should be included in the new constitution - this decision had already been taken by the government.

In Tanzania, President Nyerere had given some "guidance" to the Presidential Commission about the need to promote "the National Ethic" in the one-party state by a strict adherence to the rule of law and the protection of human rights. As we have seen, he left the issue on whether to have a bill of

rights for the Commission to resolve. In Malawi, on the other hand, there was no such thing as any "directives" or "guidance" from the government as to how the Constitutional Committee was to approach its task, and, more than this, the discussion on whether or not the new Malawian Constitution should provide for a bill of rights was touched on as a reply to a question "Will Malawi become a one-party state under the Republican Constitution?"

Probably of all bodies appointed to recommend the best forms of constitutions suitable for one-party systems of government in Commonwealth Africa (notably Tanzania, Malawi, Sierra Leone), Zambia's National Commission displayed a characteristic courage and independence in its recommendations of the principles underlying the one-party state, especially those that related to the place of fundamental rights and freedoms in the proposed single-party system. The Commission's recommendations on personal liberty and the right to freedom, for example, were characteristically liberal in favour of detainees or restrictees, and were intended to enhance the value of those rights by suggesting some curtailment to the powers of the executive over those detained or restricted. In recommending this, the Commission was merely projecting the general revulsion which many petitioners displayed in condemning certain features of the provisions in the Republican Constitution which related to personal liberties. The Commission reported that:

"Many petitioners made strong representations in favour of the right to personal liberty and the right to freedom of movement as enshrined in the Constitution. They criticized many aspects of the provisions relating to restrictions and detention without trial....."⁹¹

However, the Commission felt that:

".....in the interest of security, provisions for detention without trial should be retained in the Constitution provided the powers of the executive were curtailed, the detention period before the review was reduced, the grounds of detention were served in a shorter period and that detainees were free to communicate with their lawyers and relatives".⁹²

It is interesting to note that the safeguard for detainees or restrictees which the Commission proposed to be written into the One-party Constitution would, if they were implemented by the government, have reversed the position regarding those provisions to that obtaining under the Independence Constitution before it was amended in 1969 (as we have seen in Chapter Six). First it is important to note what the safeguards recommended by the One-party Commission were:

- 1) that there be no detention without trial except during a state of emergency;
- 2) that a detainee or restrictee be furnished with a written statement specifying the grounds for his detention or restriction within ten days;
- 3) that the notification of detention or restriction be published in the Government Gazette within fourteen days of such detention or restriction;
- 4) that a tribunal be established to review the detention or restriction within three months and that its decisions be binding on the authority;
- 5) that the composition of the tribunal which may sit in public or in camera be as follows: the chairman and two other persons (one lawyer and one other person) to be appointed by the Chief Justice in consultation with the President of the Republic.

- 6) that detainees be free to communicate with their lawyers and relatives and not be held incommunicado;
- 7) that whenever a state of emergency is declared while parliament is not in session or after its dissolution, the National Assembly be summoned within twenty-eight days of the date of the proclamation for approval; and
- 8) that a declaration of a state of emergency ceases to have effect after a period of six months from the date of the proclamation unless the National Assembly approves its continuation.

The government, however, rejected the suggested safeguards, arguing that ".....at this stage in the nation's development and in view of Zambia's geo-political position in Southern Rhodesia these recommendations could not be implemented without detriment to Zambia's security and sovereignty".⁹³

The provisions of Chapter III under the Republican Constitution, under which detentions and restrictions were declared, were therefore to remain. In any case, there seemed to be a paradox in the Commission's recommendations in one of the vital areas of a bill of rights, in the view of the presidential directive that "the fundamental rights and freedoms of the individual shall be protected as now provided under Chapter III of the Constitution of the Republic of Zambia". In other words, by virtue of this directive it was arguably outside the Commission's terms of reference for it to suggest any changes with regard to the form or content of the bill of rights.⁹⁴ But this directive was in itself contradictory, in that certain sections of the bill of rights, like the freedom of assembly and association which gives people the right to form rival political parties, could not be retained in the

One-party Constitution. The Commission noticed this and then commented that:

"Notwithstanding the directive in our terms of reference that the fundamental rights and freedoms of the individual shall be protected as now provided for under Chapter III of the Constitution of the Republic of Zambia, we considered that by implication those sections which gave people the freedom to form more than one political party could not be retained in the constitution".⁹⁵

Apart from this change, the bill of rights as it existed in the Republican Constitution - both in form and substance - was reproduced in the One-party Constitution which came into force on 13th December 1973.

The critical question of whether or not a bill of rights can co-exist with a one-party state should now be examined in the next chapter.

NOTES

1. International Commission of Jurists (Search Press, London, 1976), p.112.
2. This is discussed at a later stage in this chapter.
3. For a statistical account of TANU's electoral programme, see Report of the Presidential Commission on the Establishment of a Democratic One-Party State, Paras.25-32.
4. Ibid., Para.31.
5. Quoted in The Executive in African Governments by B.H. Selassie (Heinemann, London 1974) p.149
6. For a somewhat extended discussion about political parties in Zambia, see William Tordoff and Ian Scott, "Political Parties: Structure and Policies", in Politics in Zambia by William Tordoff (ed.), (Manchester University Press, 1974), p.107.
7. See David Mulford, The Northern Rhodesia General Elections (1962), especially Ch.VI.
8. Legislative Assembly Debates, March 20, 1964, Col.420. Also speech at Chifubu on January 17, 1965, quoted in Colin Legum (ed.), Zambia: Independence and Beyond
9. Proceedings of the Annual General Conference of the United National Independence Party, held at Mulungshi, August 14-20, 1967, ZIS, Government Printer, Lusaka, pp.10-11.
10. Press Conference on February 25, 1972. Quoted in the Report of the One-party State Commission, Para.2(1975).
11. Presidentialism in Commonwealth Africa, ibid., p.225.
12. On this subject see Robert Matteno, "Cleavage and Conflict in Zambian Politics: a Study in Sectionalism", in Politics in Zambia by William Tordoff (ed.), op.cit., p.62.
13. Nshila (No.276), August 23, 1968. Quoted in Cherry Gertzel (ed.), materials about The Political Process in Zambia, University of Zambia, Vol.I, p.243.
14. Ibid.
15. Nkumbula v. Attorney-General for Zambia, HP/CONST/Ref./1/1972, of April 1972, unreported.

16. For an excellent exposition on this subject, see Jan Pettman, Zambia Security and Conflict (London, 1974), in particular Chapter Five. See also Robert Matteno, "Zambia and the One-party State", East Africa Journal, February 1972, pp.14-16.
18. See Report of the One-party Commission, Paras, 33, 41, 42 and 57.
19. Government White Paper on Summary of Recommendations Accepted by the Government, op.cit., p.4. Author's own emphasis.
20. Wheare, The Constitutional Structure of the Commonwealth (Clarendon Press, Oxford, 1960)
21. Report of the One-party State Commission, Para.16.
22. National Assembly Debates, Hansard No.33, of July 4-August 30, 1973, Col.87.
23. See Kenneth Robinson, Autochthony and the Transfer of Power, for an extended account of this proposition as it happened in other parts of Africa.
24. Julius Nyerere, quoted in B. Selassie, The Executive in African Governments, op.cit., p.149.
25. Ibid., p.150. But see a contrary and completely different view about the justification of the one-party system on tradition.
26. Ibid. For an extended discussion of how the one-party state in Kenya originated, see Nwabueze, Presidentialism in Commonwealth Africa, op.cit., pp.217-20. For further details, see Nwabueze, ibid., pp.220-21. All opposition parties in Uganda were banned in 1969, following an attempt on the life of President Milton Obote.
27. As to whether the results of the referendum reflected the genuine expression of the people's choice, see William Harvey, Law and Social Change in Ghana (1966), p.323, who thinks that the election was rigged.
28. Article 1A.
29. See Malawi Government White Paper (No. 002 of 1965) Introduction.
30. Question No.7, see Government White Paper (No.002 of 1965).
31. Section 4(1)(2) of the 1966 Malawi Constitution.
32. See Report of the Presidential Commission on the Establishment of a Democratic One-party State, Dar es Salaam, 1964, Government Printer.

33. Report of the National Commission on the Establishment of a One-party Participatory Democracy in Zambia, Lusaka, 1972, Government Printer, see Appendix 1.
34. See Report of the National Commission, ibid., Para. 13.
35. Constitution (Amendment) (No.5), Act. No.29 of 1972.
36. Section 12A(1), ibid.
37. Section 23 of the 1964 Constitution.
38. (1972) ZLR III.
39. Section 22 of the 1964 Constitution.
40. Section 25, ibid.
41. Per Cole, C.J., at p.114, ibid.
42. Cap.181 of the Laws of Zambia, 1972 edition.
43. Section 2 of the Act, ibid.
44. "28(1) Subject to the provisions of subsection (6) of this section, if any person alleges that any of the provisions of Sections 13 to 26 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.
(2) The High Court shall have original jurisdiction
 - (a) to hear and determine any application made by any person in pursuance of subsection (1) of this section;
 - (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section;and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Sections 13 to 26 (inclusive) of this Constitution.
.....
(5) No application shall be brought under subsection (1) of this Constitution are likely to be contravened by reason of proposals contained in any bill which, at the date of the application, has not become a law".
45. African Law Report, SLI (1967), p.1.
46. Quoted ub tge judgment at p.8.
47. Ibid., p.10.
48. Per Cole, C.J., at p.13.

49. Quoted by Cole, C.J., at p.7 in Steele's case, ibid.
50. Article 13(1) of the Republican Constitution of Ghana (1960).
51. Article 13(2), ibid.
52. [1961] GLR 523.
53. Per Korsah, C.J., ibid., p.534.
54. Ibid., p.535.
55. See K.A. Busia, Africa in Search of Democracy (Routledge and Kegan Paul, London, 1967), Chapter 8; also Nwabueze, Presidentialism in Commonwealth Africa, op.cit., pp.92-98.
56. Nwabueze, ibid., p.92.
57. See Nwabueze, ibid., p.336.
58. Quoted in Busia, Africa in Search of Democracy, op.cit., p.131-32.
59. Journal of the International Commission of Jurists, No.18, March 1964, p.10.
60. K.A. Busia, Africa in Search of Democracy, op.cit., p.133.
61. K.A. Busia, ibid., p.127. For comments on the circumstances leading to these events, see T.M. Franck, Comparative Constitutional Process (Sweet and Maxwell, London, 1968), pp.151-152.
62. Section 1, 1963, No.883, Schedule 1, ss.1-16.
63. Section 1, 1964, No.916, Schedule 2, ss.11-17.
64. See Malawi Government White Paper (No.002 of 1965), upon the Republican Constitution (Para. 24).
65. Ibid. This view presumably was a response to the Minorities' Commission in Nigeria, supra.
66. For the content of the UN Declaration of Human Rights, refer to Chapter 1.
67. These are contained in Chapter 1, Section 2 of the 1966 Malawi Republican Constitution.
68. Section 2(2).
69. For a discussion of some laws passed in apparent inconsistency with the basic principles of government, see Simon Roberts, Public Law (1966), pp.321-22. Also by the same author in Journal of African Law, Vol.10, No.2, at p.131.

70. See Simon Roberts, Public Law (1966), p.304.
71. Report of the Presidential Commission on the Establishment of a Democratic One-party State in Tanzania, op.cit., at p.30.
72. Ibid., p.31.
73. Ibid., p.3. For a detailed account of the relationship between the need to secure public order and security on the one hand, and civil liberties on the other, see Y.P. Ghai and J.P.W.B. McAuslan, Public Law and Political Change in Kenya (Nairobi, 1970), pp.407-56.
74. Report of the Presidential Commission, op.cit., Para.102.
75. As to the extent to which this problem manifests itself in a new emergent state, see B.O. Nwabueze, Presidentialism in Commonwealth Africa, op.cit., Ch.XII. Also D.V. Cowen, The Foundations of Freedom (Oxford, 1961), Ch.6.
76. Report of the Presidential Commission, op.cit., Para 103.
77. Ghai and McAuslan, Public Law and Political Change in Kenya, op.cit., p.429.
78. Supra,
79. The excerpts of the Memorandum are quoted in K.A. Busia, Africa in Search of Democracy, op.cit., at pp.136-37.
80. Ibid., at p.137.
81. Ibid.
82. Ibid.
83. See Report of the Presidential Commission, op.cit., Para.13.
84. Ibid., p.32.
85. See Nwabueze, Presidentialism in Commonwealth Africa, op.cit., at pp.303-4.
86. See Report of the Presidential Commission, op.cit., p.32.
87. Ibid.
88. In T.M. Franck, Comparative Constitutional Process, op.cit., p.8.
89. Sierra Leone (1978) has also retained a bill of rights in its one-party constitution.
90. Report of the National Commission, op.cit., at p.ix.

91. National Commission, ibid., Para.32.
92. Ibid.
93. Government White Paper on "Summary of Recommendations Accepted by Government", p.3, op.cit.
94. These 'presidential directives' to the National Commission were clearly part of the terms of reference since the Commission were "in their considerations and recommendations", to "pay due regard and adhere....." to them
95. Report of the National Commission, op.cit., Paras. 30 and 31.

CHAPTER 9

HUMAN RIGHTS AND THE ONE-PARTY STATE (II)A. The Impact of the Single-Party System on the Protection of Civil Liberties

It is often thought that the concept of a one-party state is in itself incompatible with the constitutional protection of human rights. Dr. Aihe, for example, considers that "...the adoption of this system of government (i.e. the one-party state) is clearly inconsistent with the enjoyment of the fundamental rights of the individual...."¹ Professor Nwabueze, too, agrees with this view when he says that a bill of rights cannot co-exist with a de jure one-party state "without serious modifications and qualifications".² Dr. Busia has also denounced the single-party formula and questions ".....whether it is the best way to ensure the democratic values of freedom, justice, human rights, and the Rule of Law",³ which all African leaders avow. Many other writers on African political and constitutional affairs, Africans and outsiders alike, have given similar views on the implications of one-party states. Yet very few, if any, of these writers have attempted to show precisely how, or to what extent, the introduction of a one-party state undermines the enjoyment of civil liberties. It is therefore necessary to consider in detail how many of the rights and freedoms protected under the bill of rights can be shown to be possibly affected by the introduction of a one-party state.

While it is obviously true to say that the adoption of a single-party system will inevitably impinge on the enjoyment of certain rights and freedoms, especially those of a political nature, it is also true that in fact many of the guaranteed rights can exist and operate effectively within a one-party state. For

example, under the Zambian Bill of Rights, it is difficult to see why such guaranteed rights as the right to life; personal liberty; freedom from slavery, forced labour, inhuman treatment, and deprivation of property; the right of privacy of the home, and the protection of the law and freedom of conscience - must necessarily fail to operate within the context of a single-party situation. It can, of course, be argued that even these rights and freedoms are vulnerable to erosion in the political circumstances of a one-party state, because the requirement of a specified parliamentary majority for the amendment of the Constitution is diminished in extent; Parliament may at any time and with ease, amend the Constitution - including the Bill of Rights - to suit the political ends of the government. Personal liberty is not secured by a constitutional guarantee of rights alone. No constitution, however strongly entrenched, can prevent the powerful executive in a one-party state against the temptation to encroach upon the liberties of individuals, unless there is a legislature willing to act as a counterpoise against such temptation. Moreover, in a young, largely illiterate country like Zambia, where a vigilant and responsive public opinion is absent, coupled with the fact that the Government is in complete control of the mass media, there is clearly no means by which any incipient tyranny by the executive can be exposed, criticized, and resisted. These factors are also relevant when considering the position of the judiciary in the event, for example, of a conflict arising between it and the Government, perhaps over a court decision declaring a governmental measure invalid. The court will have no outside ally, like an Opposition in Parliament or a critical public opinion, which would

support its decision against an embittered executive. The point intended to be advanced, however, is that the political and social conditions such as we have referred to above, do not create a favourable climate in African one-party states whereby individual liberties can claim a sacrosanct status within those constitutional systems.

The observation made above would lead us to qualify the assertion made earlier that most of the rights and freedoms under the bill of rights are not incompatible with a one-party state. What this means is that, provided the single Party and its government share a genuine commitment to respect for individual liberties, there is no reason why a substantial number of rights and freedoms may not operate within the framework of a one-party constitution.

In relation to Zambia, the point has already been made that the introduction of the one-party state in 1972 did not, in any substantial way, alter the substance of most of the rights and freedoms that had previously existed under the independence constitution. Most of these rights and freedoms were reproduced intact in the one-party constitution. Hence, of the fourteen guaranteed rights and freedoms under the independence constitution, only three can be shown to have been directly affected by the establishment of a one-party state. These are freedom of assembly and association; freedom of expression; and freedom against discrimination on political grounds.

i) Freedom of assembly and association and the one-party state

It is self-evident that the freedom of assembly and association - which confers on all individuals the rights, among other things, to form or to belong to any political associations - cannot possibly exist under a de jure one-party constitution. Thus, as the National Commission on the Establishment of a One-party Participatory Democracy observed:

"Notwithstanding the directive in our terms of reference that the fundamental rights and freedoms of the individual shall be protected as now provided under Chapter III of the Constitution of the Republic of Zambia, we considered that by implication those sections which gave people the freedom to form more than one political party could not be retained in the Constitution".⁴

That freedom of association and the single-party system are two ^{inconcilable} doctrines, arises from the fact that not merely is the basic idea underlying the one-party state in that only one political party is allowed to operate but, further, that all political activity in the country is to be conducted by, or under the auspices of, that one party. This means that an individual either joins the party or is left without any political association. In other words, the one-party system restricts the right of those who, for whatever reasons, do not join the ruling party, to form or to belong to any other political party. Thus the Constitutional Amendment of December 1972, which legally constituted a one-party state in Zambia, stipulated that it is unlawful for any person to:

".....form or attempt to form any political party or organization other than the Party [UNIP] or to belong to or assemble, associate, express opinion or do any other thing in sympathy with such political party for organization".⁵

However, the Constitution still leaves people free to form and to belong to non-political associations provided they are not prejudicial to the national interest. But the important point here is that, by virtue of the provisions in the 1972 Constitutional Amendment cited above, it is clear that those persons who fundamentally disagree with the ruling party on points of principle or ideology in the conduct of government are not free to form rival political associations to enable them to promote their views in competition with the ruling party. Under the one-party system, only members of the ruling party are entitled to participate in the political processes of the country by the opportunities given to them to criticize, to express and to participate in the formulation of policy opinions within the established party organs. This means that party membership is a pre-condition for the exercise of political rights (except the right to vote in parliamentary and presidential elections) in a one-party state.

a) The importance of party membership in a one-party state

The National Commission remarked that:

"We considered the question of party membership very seriously as we felt that it was the key to the success of the One-Party Participatory Democracy. We did not favour the idea of exclusive party membership as it meant that only a few people would have the privilege of belonging to the only political party contrary to the spirit of participatory democracy".⁶

True, one of the justifications for the establishment of a one-party state was that the dominant party like UNIP or TANU, was a mass party as opposed to an elite group,

that is a minority ideologically dedicated group who provide from the above the leadership necessary to activate the inert mass of the community. This is the model of one-party systems which is to be found in Russia and its satellite states in the East, and also in China. The Presidential Commission in Tanzania, though appreciating the practical advantages the elitist view of the party may have in terms of dynamic leadership (as in China and Russia), nevertheless decisively rejected that the one-party system in Tanzania should be based on that model. The Commission in rejecting the elitist view of the party remarked that:

"We find it at variance with democratic principles and, in particular, with the principle of democracy as understood in traditional African society. We do not see TANU as an elite but as a mass party through which any citizen of goodwill can participate in the process of government".⁷

Hence one of the distinctive features of African single-party systems is that the ruling party itself is seen as a mass party or as "a National Movement which is open to all - which is identified with the whole nation...."⁸

President Nyerere in his usual eloquent style of arguing, has put forward the rationale in opting for a mass party as opposed to an elitist party within the context of a single-party system. Perhaps because of the relevance and pointedness of his views on the matter under discussion, he deserves to be quoted in full:

"No party which limits its membership to a clique can ever free itself from the fear of overthrow by those it has excluded. It must be constantly on the watch for signs of opposition, and must smother 'dangerous' ideas before they have time to spread."

But a National Movement which is open to all - which is identified with the whole nation - has nothing to fear from the discontent of any excluded section of society, for there is then no such section. Those forming the Government will, of course, be replaced from time to time: this is what elections are for. The leadership of our Movement is constantly changing: there is no reason why the leadership of the Nation should not also be constantly changing. This would have nothing to do with the overthrowing of a Party government by a rival Party. And, since such a National Movement leaves no room for the growth of discontented elements excluded from its membership, it has nothing to fear from criticism and the free expression of ideas.

On the contrary, both the Movement itself and the Nation have everything to gain from a constant injection of new ideas from within the Nation and from outside. It would be both wrong, and certainly unnecessary, to feel we must wait until the leaders are dead before we begin to criticize them".⁹

Thus it is that in a one-party state, the prohibition of rival parties may involve a total exclusion from organized politics for some people, because they do not either wish or are not allowed to join the only party. Hence the possibility of total exclusion which may follow from the prohibition of rival parties makes the right to join the party and to remain in it a very vital one, which, it is suggested, deserved to be specially protected by the constitution. In what was hitherto a multi-party state, as in the case of Zambia, the chances of exclusion from organized politics are pretty real, since certain leaders of the defunct opposition parties might be denied

admission into the single party because of their past record of opposition. Happily, in Zambia it was a declared policy of the one-party government not to refuse admission to UNIP to former members of ANC or UPP. However, as we shall see, most former members of UPP and ANC have not taken up membership of UNIP.

The critical question is, however, what are the conditions of admission into and expulsion from the single party, both in Tanzania and Zambia? In discussing this theme it is to be observed that two rights are here in conflict, viz.:

".....the right of an interested individual not to be excluded from participation in politics within the single party, and the right of any organization to determine who to admit as member and the conditions of such membership".¹⁰

In this respect the Tanzanian approach to the conflict is instructive to note. The Tanzanian Interim Constitution resolves the conflict by providing that:

"Every citizen of Tanzania who has attained the age of eighteen years and who subscribes to the beliefs, aims and objectives of the Party as expressed in the Constitution of the Party shall, on payment of the fees and subscriptions provided for in the Constitution of the Party, be entitled to be a member of the Party".¹¹

In recommending this provision in the Constitution to serve as a criterion for the admission of people to membership of the Party, the Presidential Commission quite rightly argued that if membership of the party is automatic by right of citizenship alone and with no commitment to the beliefs, aims and objectives of the

party, then the party would have become co-extensive with the nation, and thereby cease to function as a political party in any serious sense.¹² And in the view of the National Commission on the Establishment of a One-party Participatory Democracy in Zambia, automatic membership of the only party would be "tantamount to a partyless state".¹³ The Tanzanian Presidential Commission further argued that it should not be objectionable to require adherence to the beliefs, aims and objectives of the party, because the principles expressed therein are not based upon any narrow ideology. To insist on "a narrow ideological conformity", the Commission admitted,

".....would clearly be inconsistent with the mass participation in the affairs of the party which we regard as essential.The principles of TANU.....do not contain any narrow ideological formulations which might change with time and circumstances. They are a broad a statement of political faith..... A party based on these principles and requiring adherence to them as a condition of membership would be open to all but an insignificant minority of our citizens and would, we believe, be a truly national movement".¹⁴

It must perhaps be accepted here that the conditions of membership stated above are liberally formulated and demand from an interested person only minimum requirements to be satisfied for admission as a member of the party. But of great importance is the fact that once admitted as a member of TANU, the Constitution of the Party gives protection against arbitrary expulsion to any such member. Thus a person may be expelled only on grounds of disloyalty to, or violation of, the beliefs, aims and

objectives of the party or default in payment of fees and subscriptions, but not because he is critical of, or opposed to, the leadership or to certain policies pursued by the government.

The Tanzanian approach of admission to party membership was never followed in Zambia. In fact, unlike the Presidential Commission in Tanzania which discussed at length how it saw the character and role of TANU in a one-party state with emphasis on whether it should be operated as an elitist or mass party, the National Commission in Zambia never offered any theory on the character and role of UNIP once it became the only party in the country. However, it is clear that UNIP in Zambia operates on much the same principles as those upon which TANU in Tanzania operates.

Unlike that of Tanzania, the national constitution in Zambia does not contain any provision specifying conditions of admission into UNIP. This means that the question of having some kind of constitutional protection of the right to belong to, and remain in the party is not available under the one-party constitutional arrangement in Zambia. The matter is left entirely to the discretion of the party in accordance with its constitution. However, because of the National Commission's recommendations "that people should be free to join and to belong to the only political party",¹⁵

the UNIP Constitution also formulates a liberal criterion for membership which is to the effect that:

"Membership of the Party shall be voluntary and open to any Zambian citizen who accepts the objectives and rules of the party".¹⁶

Thus both in the case of Tanzania and Zambia, the insistence on an aspiring member of the party is that he must be prepared to adhere to its aims and objectives. This requirement should be defended in that an organization which is open to all notwithstanding that they may be disloyal or hostile to the aims and objectives of the association, or which has no power to expel those guilty of flagrant breaches of its rules or other serious misconduct, can hardly be expected to be able to maintain its authority. Also "this sort of membership", in the view of the National Commission, "might bring in many unwilling Party members".¹⁷

b) Party identification in Zambia

Since party membership is the basis for the exercise of certain important political rights in a single-party state, it is only proper that this discussion should touch on the whole question of how, in practice, the people of Zambia have come to be associated with UNIP as members of the Party. For the more people come to be identified with the Party as members, the more representative and legitimate the government becomes. Conversely, if a large proportion of the population fail to become party members for various reasons - either due

to sheer apathy among the people, or because of political frustrations engendered by the introduction of a one-party rule, then the government cannot claim true legitimacy for itself. It will be recalled that we quoted President Nyerere as saying that:

".....A National Movement which is open to all, which is identified with the whole nation, has nothing to fear from the discontent of any excluded section of the society, for there is no such section".¹⁸

The question is whether there is such a section in Zambia. The evidence available indicates that the position regarding fully paid-up membership of UNIP after three years of one-party rule was one of almost "apathetical attitude of people towards joining the Party as registered card-carrying members".¹⁹ In that period only five per cent of the total population of Central Province were fully paid-up members of the Party.²⁰ And of the 1,185,000 residents in the most populous province of the Copper Belt, only 32,194 were paid-up members of the Party.²¹ The position was not any better in the remaining provinces. The report in the government-owned national newspaper, The Zambia Daily Mail,²² indicated that:

"There is not a single province in the country which had been in the position of boasting of party membership which reflects the true population of the area". And "For one reason or another, the past two years have been very bad for UNIP membership".

As a result of the reluctance of people voluntarily to take up membership of the Party, UNIP officials launched a "vigorous membership drive" campaign, resorting to door-

to-door card-checking and refusing to allow individuals without cards to enter and buy from markets, shops, bars, etc., and from riding on 'buses.²³ However, there was evidence that many former members of the banned United Progressive Party and the African National Congress were not willing to join UNIP. In fact, ex-UPP members and their leaders in particular, were openly accused by the government to be engaged in "dark corner meetings". As to these reports, the government, through its Minister of Home Affairs, responded by instructing the police to arrest "on the spot" any ex-UPP leader or member found "organizing or attending such subversive meetings".²⁴ All this boils down to the assertion that the introduction of a one-party state in Zambia left a large segment of the population politically frustrated. In any case, even when the National Commission was receiving evidence to assist in establishing the form of one-party system in Zambia, it was reported that "three-quarters of the petitioners were ruled out-of-order" because their submissions were outside the terms of reference, which did not allow the Commission to hear evidence supporting or opposing the introduction of a one-party state.²⁵

The effect of having only a few citizens taking up membership of the only party, as shown with respect to UNIP in Zambia, is of constitutional significance, since this may well determine the extent to which citizens are

able to participate in the process of government - thereby defeating the ends of "participatory democracy", an ideal with which the single-party system was closely associated.

c) Integration of non-political organizations

It is true that even in a one-party state people are free to form and belong to non-political organizations "provided they are not prejudicial to the national interest".²⁶ This means that formation of non-political associations based on tribal loyalties with intent to engage in tribal, regional, racial or religious propaganda to the detriment of any other section of the community is prohibited. Under the Societies' Act,²⁷ for example, the Registrar of Societies is empowered to refuse registration to any organization if it appears to him that such an organization "has among its objects, or is likely to pursue or to be used for.....any purpose prejudicial to or incompatible with the peace, welfare or good....." of the Republic.²⁸ Apart from this limitation placed on the freedom to form a non-political organization - which sounds justified in the circumstances of an African society - individuals have retained their right to associate freely with other persons and in particular to form or belong to non-political associations like the trade unions, even within the context of a single-party system. However, the reality of this freedom is further attenuated by the fact that invariably all the one-party governments, at least those of Commonwealth Africa, display a tendency towards co-opting every organization of any public significance

like trade unions, women's and youth associations, co-operative societies, farmers' associations, students' unions, etc., under the umbrella of the ruling party. Following the example set by Ghana under Kwama Nkrumah and his Convention People's Party, and that of Tanzania and Malawi,²⁹ Zambia also instituted the device of "affiliated membership". It is important to explain here the point that under UNIP's Constitution there are two classes of members, viz., individual members and affiliated members.³⁰ Affiliated membership consists of organizations designated as "affiliated organizations". The National Commission listed, ¹¹⁻⁵² as the Zambia Congress of Trade Unions, Chamber of Commerce and Industry, the National Women's Council, the National Youth Council of Zambia, farmers' organizations, co-operative movements, and all professional societies, such as the Law Association of Zambia.³¹

The effect of having integrated or affiliated these organizations is that they cease to operate independently of the party and government as before. In the one-party state they are brought under the control of the party and the government. Their activities are henceforth required to conform to the constitution and rules of the party. Executive members of some of these organizations are also members of the National Council of the Party, and hence take part in the deliberations that lead to policy formulation of the party and government.³² In the second

place, representatives of each of the trade unions affiliated to the Zambia Congress of Trade Unions, and at least one delegate from each organization affiliated to the party, and all members of the national Council (which is also composed of representatives of affiliated organizations) are delegates at the General Conference of the Party.³³ The importance of this is that under the Zambian Constitution, it is the members of the General Conference who elect a person to be a president of the Party who then becomes the sole candidate in an election to the office of President.³⁴ Thus the status of being an "affiliated organization" involves more than being a member of the party, but also extends to the actual absorption of the organization concerned into the party. Perhaps this can best be illustrated by looking at the relationship that exists between the trade union movement in the country and the government. It should be appreciated at the outset that the government's concern over the operations and activities of the trade unions is understandable since, being the watchdogs of the workers' interests, these are strategically well-placed to shake the political standing of the government. Thus it was necessary to devise some system whereby the activities of all trade unions in the country should be placed under close control and supervision. This was done through creating one statutory organization, the Zambia Congress

of Trade Unions (the ZCTU), to which all the various trade unions in the country are statutorily required to be affiliated.³⁵ As we have seen above, the Zambia Congress of Trade Unions is itself affiliated to UNIP - but there are more direct ways in which it is under the control and supervision of the government. The Secretary-General of the Zambia Congress of the Trade Unions is appointed, and can be dismissed, by the President. The Secretary-General of the ZCTU co-ordinates the activities of all other trade unions in the country. He is the chief executive officer and chief spokesman of the union, responsible for its overall supervision and management, and for the appointment and dismissal of the other general officers. He is the union's spokesman at all conferences and at general and executive council meetings. In the discharge of his functions he is nevertheless subject to the directions and instructions of the Minister of Labour. He is also, of course, responsible to the President. Thus, in the circumstances, the government's control over the trade union movement in the country could not have been more complete.

However, there is here a direct relationship between the practice of forcing private associations to be wings of the only party on the one hand, and protection of human rights on the other. The clear result of so doing is to deprive those associations of their independence to run their affairs free from interference from the

party and government. Experience has shown that effective protection of human rights is further enhanced in circumstances where those private organizations like the trade unions, and professional associations are allowed to operate independently and for them to act as agitators for the rights existing within their sphere of operations. For example, trade unions are in fact "guardians" of the interests and rights of the workers which they are prepared to defend in the face of encroachment by the government or by the employers. The legal profession organized in an association has surely a vital role to play in the vindication of individual rights under the law.

In this connection, the late Dr. Busia has made the relevant point that:

"Democratic governments usually respect the independence of private associations and where necessary they provide the constitutional framework within which they can function and pursue their objectives; but authoritarian regimes seek to curb or swallow up all such associations in a monolithic single party. In the democratic society, the associations are recognized as promoting one interest or another, or of safeguarding one form of liberty or another; but authoritarian regimes see them as undesirable sources of independent power to be checked in the interests of 'social order'".³⁶

It is true that the rights of the workers to associate in a trade union have not been interfered with under the one-party constitution, even though the structure of the union movement and its relationship with the party and government has radically been changed in order to ensure government's control over unions. But it

is the forcing aspecting of requiring certain private associations to affiliate to the party which is objectionable. The right to associate necessarily implies the right not to associate. Those associations should be left entirely free to choose whether to or not to be affiliated to the party - in the same way that a citizen should be left alone to choose whether to join or not to join the party as a member.

ii) Freedom from discrimination on grounds of political opinion and the one-party state

Interestingly, the National Commission did not perceive that discrimination on grounds of holding different political opinions might be commonplace in a one-party state. The constitutional provision relating to non-discrimination is contained in Article 25, which is a replica of a similar provision in the independence constitution. It provides that ".....no law shall make provision that is discriminatory either of itself or in its effect". And the following subsection defines the expression "discriminatory" to mean:

"Affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description".

In the exception clauses that follow, no mention is made to the effect that the provision on non-discrimination will not apply to non-members of the ruling party who, as we have seen earlier, are obviously subjected to disabilities or

restrictions in the enjoyment of certain of their political rights which are enjoyed by members of the party. The reason why other people do not become members of the party, as we have again shown, may stem from their genuine conviction in principles, policies or ideologies which may be different from those pursued by the ruling party. In other words, their political opinions about a number of fundamental subjects of politics are not identical with those of the Party, and this is what prevents them joining it. Quite clearly the exclusion of non-members from party membership and hence from the enjoyment of some essential political rights is explicable on the grounds that they may hold different political opinions. This is therefore a clear incidence of discrimination against a section of the community on grounds of their political views. By extension of this argument, it could be submitted that the law introducing a one-party state was, in effect, discriminatory in its application to those who could not join the party on account of their different political views. This point, unfortunately, was not raised, and therefore not discussed in the Nkumbula case which tested the constitutionality of the act of introducing a one-party state.

The reality of a one-party state vis-a-vis the protection from discrimination on the ground of political opinion, becomes evident when one remembers that a non-member of the party is barred from standing for parliamentary and presidential elections, nor can he seek election as a councillor. He

nevertheless retains his right to vote in these elections. Further, with the announcement in December 1976, as policy of the party, that "appointments to posts of management in parastatal organizations should be limited to UNIP supporters who identify themselves without the Party's aspirations",³⁷ a non-member is again put to a disability in that his chances of access to some executive posts in the government and in the public corporations of all kinds - including institutions of higher learning - is blocked by a definite policy of the party, and hence of the government.

iii) Freedom of expression and the one-party state

Next in the line of freedoms that are bound to be curtailed by the introduction or existence of a de jure one-party state is the freedom of expression. This freedom is one of the most important elements in the sustenance of a free and democratic society. As one political scientist has said, "the freedom of expression", taken together with other freedoms (like the freedom of assembly and association) is:

".....primarily concerned with a citizen's right to political self-expression - effective participation in political life, and hence constitutive of democracy itself".³⁸

And as Dr. Busia has pointed out:

"Democracy is government by consent. Public discussion, free elections, the right of freedom of speech and association are regarded as essential because they are necessary for achieving consent".³⁹

Freedom of expression can therefore be regarded as the instrument through which the wishes, preferences and dislikes

of the people are or can be discerned. By affording some formal means whereby an individual, whether alone or in association with others, can express his opinion on any matter of some public significance and try to win others to his point of view - there is generated an continuing debate about how matters of public affairs should be run. It is in this context that the medium through which this debate on public issues is conducted should also be free from executive interference. The "national debate" is formally conducted through the legislature by the people's representatives, or in the case of a one-party state, through the party organs on top of the platform provided by Parliament. Mass media is the next important mechanism that handles public debate on issues of national importance.

To what extent then, are parliament and the mass media, as the major articulators of public opinion, independent of the executive in a one-party state? Secondly, within what degree of latitude is freedom of speech allowed in a one-party parliament? Finally, how free is the mass media in the task of mobilizing public opinion even against the government, in cases of overt misuse of power? Before dealing with these questions, it is important to consider the prospects for freedom of speech within the party's central organs themselves, i.e. in the National Council and the Central Committee.

a) Freedom of speech in the central organs of the party

The experience in Tanzania and Zambia confirm the statement that in a one-party state the tendency has been one of encouraging free and frank discussions about any

matter of public concern including the airing of critical views about the activities of the government and its officials within the central organs of the party. For one thing, it must be remembered that the proceedings in the party organs concerned are conducted in privacy, and therefore the discussions can be freer and more critical "without offending a government's natural sensitivity to criticism conducted in the view and hearing of the public". In Zambia, for example, the National Council of UNIP is the originator of all legislative proposals which are thoroughly discussed before they reach Parliament. All MPs are members of the National Council. This means that most MPs do have the opportunity of expressing their views on particular legislative proposals during the discussions in the Council. When these matters come to Parliament, it would be hoped that only the barest minimum of discussion would therefore be necessary. In fact, as will shortly be shown, the Zambian experience, perhaps unlike that of Tanzania, has been that it is in Parliament that MPs have shown a record of independent criticism and action. It was due to this unexpected action of many MPs whereby, in spite of their prior participation in discussions about legislative policy in the National Council, they still strongly attack some of these policies in Parliament, that led President Kaunda to make this rather surprising remark:

"It is most unprincipled and undemocratic for a Member of Parliament who has had the chance to discuss Party policy in the National Council to somersault in the National Assembly and begin condemning a collective decision to which he was a party.

.....If the National Council decides that a certain action has got to be taken.....by the government, in order to implement a given policy programme, that has got to be done. If it is legislative action that is needed to implement a decision of the Council, the National Assembly, as an arm of the Party, must act accordingly, without question".⁴⁰

However, it is to be noticed that even if discussions within the central organs of the party are freely conducted, this in itself does not adequately meet the needs of democracy. Although they may serve to check and temper the government, the sanction of publicity is missing. The absence of publicity ensures that the public is not made fully aware of the mistakes and shortcomings of the government. The one-party state therefore operates in such a way as to shield the government from public exposure of its shortcomings and mistakes, so that it does not need to fear loss of confidence with the people which might result in its eventual defeat at the polls.

b) Freedom of speech in the one-party Parliament

Unlike the independence constitution, the one-party constitution contained an express provision to the effect that "Members of the National Assembly shall be free to speak and vote on any issue in the Assembly".⁴¹ This provision was indeed intended to implement the National Commission's recommendations on the whole question of

how much freedom of speech by members of Parliament should be allowed in a one-party state. The Commission had recommended that "members of parliament be free to speak and/or vote as they like on any issue".⁴² Though the Government initially accepted this recommendation,⁴³ it later clarified what it meant, namely that:

"A member would of course be allowed to [criticise] provided they are also allowed to support the Government especially if they realize that the basic function of members is indeed to support the Government".⁴⁴

As for Ministers, they are not allowed to be free to criticise government policy publicly unless they resign their positions. The reason given for this ban on the part of the Ministers was that it would be contrary to the principle of collective responsibility.⁴⁵ But, it would appear that the concept of "executive responsibility to the legislature" within a single-party constitutional arrangement loses much of its meaning. Is the cabinet really responsible to parliament in Zambia? In the first place the President, who presides over cabinet meetings and who undoubtedly has a dominant voice in decision-making in the cabinet, is directly elected by the people and parliament has no role in his election. He is therefore, not responsible or accountable to parliament, and the latter cannot remove him by, say, a vote of No Confidence. In the second place, it is true that all ministers must be members of the National Assembly - naturally because they must be there to answer questions and participate in discussions. It must be pointed out that under the Zambian

one-party constitution, the cabinet is merely an agent of the Central Committee and the National Council of the Party. Legislative proposals are made by the National Council which merely directs the Minister responsible to obtain the necessary legislation and to implement the policy involved. In the third place, the Central Committee of the party is elevated above the cabinet as the chief policy-maker. Having formulated the policy, the cabinet is directed to implement that policy and should there be a conflict between the decision of the Central Committee and that of the cabinet, the decision of the former prevails. The point is that the cabinet in these circumstances, cannot be held responsible for decisions which it does not normally take. Policy decisions are taken by the Central Committee, legislative proposals are taken by the National Council of which all MPs are members. Moreover, with each member of the cabinet concentrating exclusively on administration in his own field, there is no shared policy responsibility to bind them together and make them collectively responsible for anything.

However, in spite of the limitations imposed on members of parliament, it has emerged that "the quality of debate in the National Assembly is much higher today than it was under the multi-party system'"⁴⁶ There is no doubt that the one-party Parliament in Zambia has not

infrequently debated, very critically and frankly, controversial proposals which the government sought to be given legislative effect.⁴⁷ The most notable incident when members of parliament refused to back a Government bill, was when the first Constitutional (Amendment) Bill was presented to the House in August 1974. Had the Bill been passed, its effect would have been to curtail the individual's right to sue the government for wrongful detention.⁴⁸ However, the Bill was attacked by MPs and was severely criticized and condemned as being ".....an erosion of the rule of law and a deprivation of an individual's common law remedies and other common law causes of action".⁴⁹ When the Constitution of Zambia Bill 1973 (which formally brought into effect the one-party constitution) was under consideration by the House, some MPs were critical of the fact that the provisions of the new constitution did not "Seem to embrace the Chona recommendations"⁵⁰ which sought to curtail the powers of the executive over the cabinet and its powers in relation to the protection of personal liberties during an emergency. In the view of some MPs these recommendations ought not to have been dropped by the government because they "reflected the aspirations of the people".⁵¹

Moreover, the one-party Parliament itself has been very apprehensive of attempts by "outsiders" to tamper

with its parliamentary privilege and has acted promptly in its defence when occasion has arisen.

Under the National Assembly (Powers and Privileges) Act,⁵² it is provided that:

"There shall be freedom of speech and debate in the Assembly. Such freedom of speech and debate shall not be liable to be questioned in any court or place outside the Assembly".⁵³

On 13 February 1973, the Speaker of the National Assembly received a letter of complaint from an MP in connection with an article in The Times of Zambia.⁵⁴ The article stated that a speech delivered in Parliament by one MP was prejudicial to the trial of a top government official for corruption. This statement had been made by the Director of Public Prosecutions, who also accused the MP for commenting in Parliament on a matter which was sub judice, saying that the nature of his comments could not fail to influence potential witnesses who were being approached in connection with the case - and indeed might have the effect of intimidating some of them so that they might decline to give evidence.

The MP concerned, with the support of many of his fellow MPs, claimed that an infringement of Parliamentary privilege had taken place in that his freedom of speech in the House had been attacked and questioned outside the Assembly by the Director of Public Prosecutions in a court of law. The Speaker of the House, upholding his contention had strongly defended the sanctity of the

freedom of speech in the House, saying that:

".....I have to rule that a breach of privilege has been committed and, on behalf of the House, I have to give a final warning to all outsiders that Parliament will not hesitate to punish anyone who tampers with the rights and privileges of honourable Members....."55

These events took place on the eve of the first sittings of the one-party parliament; and within two years thereafter MPs had become more critical of the activities of the Government and Party. This prompted President Kaunda to issue stern warnings against the growing "indiscipline" among the members of parliament. In what came to be called the "watershed" speech to the National Council of the United National Independence Party, the President ^{revealed} that:

".....ever since our last meeting the nation has been hearing strange 'outpourings' from the National Assembly. Members of the Central Committee, Ministers and other Party and Government leaders have been maligned. They have been accused of all sorts of oddities - tribalism, corruption, nepotism, and so on. The Party and Government have been severely criticized for alleged inefficiency and ineffectiveness. Some Members of Parliament have, in fact, been speaking as if they are not members of the Party and as if this Government is not theirs. Their anti-Party and anti-Government mouthings have left some of us with the impression that they are seeking to be an opposition Party in our one-party participatory democracy....."56

Hence, in order to place some restraints on the extent to which Members of Parliament could be free to criticize the Government and the Party, the President instructed the Speaker to take action in making disciplinary rules of the Party part of the Standing Orders of Parliament. Briefly, the "disciplinary rules" of the Party which are

annexed to the Party Constitution⁵⁷ specify "offences" which a member of the Party may commit against the Party and also the punishment consequent upon breach of these rules. Two of these rules are relevant to this discussion. Firstly, it is an offence against the Party to "[carry] on false information or propaganda which tends to injure the reputation of the Party or of any of its officials"; secondly, it is also an offence against the Party to "[publish] or [cause] to be published, orally or in writing, any matter which in the opinion of the Central Committee or the National Council is an attack on the Party or an attack on a member or official of the Party in relation to the discharge of his functions as a member or official of the Party".⁵⁸ The punishment for breach of any of these and other rules range from dismissal from office, debarring from holding office, suspension from membership and/or office, to expulsion from the Party. Of course these rules applied to Members of Parliament in their private capacities as members of the Party; but the effect of making them part of the Standing Orders of Parliament was that the rules applied to them "within the precinct of Parliament". In other words, their parliamentary privilege and freedom freely to criticize the activities of the Party together with its officials, was now restricted.

c) Freedom of the press and the one-party state

The ICJ Seminar on Human Rights meeting in Dar es Salaam in 1976, observed, in relation to the subject under discussion, that:

"Probably the most important element of freedom of expression is freedom of the press. The Seminar was unanimous that a high degree of freedom of the press is consistent with a one-party state. Its importance is even greater than in a multi-party state owing to the absence of any institutionalized opposition, so that the press constitutes the main vehicle through which views and grievances can be aired. A free and enlightened press is a powerful instrument for the protection of fundamental human rights".⁵⁹

Experience, however, shows that this is not the way the role of the mass media has or is being looked at in a one-party state. Mass media, instead, is used^{as} an instrument in promoting the ends of the party and the government alike. They are not independent institutions which can process the views of sections of the society holding contrary views about the political affairs of the country. The fate of the mass media in Zambia since the introduction of a single-party system in 1972, and more specifically, after President Kaunda's famous "Watershed" speech of July 1975, is self-evident of the extent to which the protection of the freedom of the press in a one-party state can systematically be weakened.

Since independence in 1964, there has always been three main national newspapers in Zambia, viz., The Times of Zambia, The Sunday Times of Zambia, and The Zambia Daily Mail. The Government has always appointed the Editors-in-Chief for all of these papers. Prior to its total

take-over by the Party (UNIP), The Times of Zambia was privately owned by Lonrho, and this explains why, unlike the other two papers, it showed some characteristic courage and independence in its coverage of the news and in objective analysis of important issues to the nation.

On 30 June 1975, however, President Kaunda announced that The Times of Zambia and The Sunday Times of Zambia were to be taken over by the Party one hundred per cent. The Zambia Daily Mail had always been owned and controlled by the Government. Henceforth The Times of Zambia was to be turned into an instrument "to reflect official Party and Government thinking", while The Sunday Times of Zambia was to "carry analysis.....on the Party and Government and the nation in general".⁶⁰

At the same time, the whole of the cinema industry was nationalized to enable the Government to reorient the cinema "to reflect our national values".⁶¹ On the other hand, broadcasting - both radio and television - had always been wholly in the ownership and control of the Government.

It is true to say that the mere existence of a one-party state does not, in itself, mean that the freedom of the press is thereby threatened or is necessarily eroded. Freedom of the press depends to a large degree upon the attitude of its owners - i.e. the Party and Government in a one-party state. Again, the commitment of the party and government is of crucial importance for the freedom of the press to be effective. The press will certainly need their understanding and support if its mission of fostering public

discussion on important issues and the airing of grievances through it is to be realized within the single party set-up.

It seems to us that individual rights and freedoms are secured partly by ensuring that certain institutions in the country should remain independent of the executive. We have, for example, submitted that Parliament must be left free in order for it to perform its function as a counterpoise against executive arbitrariness, especially where, as in a one-party state, the executive is surrounded with a lot of power. The press too must possess a reasonable degree of independence in order for it to serve as an articulator of public opinion and as an educator of the people to acquaint them of their rights, and as a motivator in helping to create an informed public opinion on the obligations of government officials towards the community they serve. There is, however, a third institution whose independence of the executive it is even more crucial to preserve if an effective protection of human rights is to be attained within the context of a single-party situation, and this is the "judiciary". Independence of the judiciary becomes a matter of even extra significance where, as in Zambia, the constitution embodies a bill of rights and where, therefore, the Courts are made to interpret and enforce the guaranteed rights.

In the light of the evidence presented above to the effect that the one-party government does not tolerate certain institutions in the country, like Parliament and the mass media, to operate independently

and to subject it to criticism and checks, to what extent has the independence of the judiciary survived the trend in a one-party state whereby the norm seems to be established that all government institutions must, of necessity, be brought under close control of the government? It is thus to a consideration of the subject of independence of the judiciary and the one-party state that we should now turn.

B. Independence of the Judiciary and the One-party System

The introduction of a one-party state in both Tanzania and Zambia was accompanied by a reaffirmation of the desire of the respective governments to maintain the independence of the judiciary. The Presidential Commission on the Establishment of a One-party State in Tanzania, for example, declared that:

".....the independence of the Judiciary is the foundation of the Rule of Law. The Commission believes that this is true as much in a one-party state as it is where the law of the Constitution recognizes the opposition".⁶²

In Zambia too, it was one of President Kaunda's directives to the One-party Commission that:

".....the supremacy of the rule of law and independence of the judiciary shall continue to be maintained".⁶³

And the conclusions of an international Commission of Jurists Seminar on Human Rights in a One-party State, meeting in Dar es Salaam in 1976, emphasized that:

".....The cornerstone of the independence of the judiciary lay in its power to dispense justice without fear or favour and with total impartiality and respect for the principles of the rule of law. This should be ensured by the embodiment within the Constitution of clear rules governing the qualifications and calibre of persons appointed to the bench, objective methods of appointment, security of tenure of the office and protection from removal from office save on the grounds of gross misconduct or physical or mental capacity as determined by an independent tribunal or similar means. These safeguards were vital to the independent and impartial exercise of judicial authority".⁶⁴

It is necessary now to examine the nature of the safeguards to secure the independence of the judiciary under the Zambia independence constitution before proceeding to note what changes were made with the introduction of a single-party system in 1972. This will be followed by an examination of the extent of political influence on the functioning of the judiciary.

i) The position at independence

a) Some historical background to the development of the independence of the judiciary in Commonwealth Africa

During the colonial period, the judiciary was part of the colonial civil service, or rather its special branch, the Colonial Legal Service, and as such the appointment of judges remained in the hands of the Secretary of State for the Colonies. Like other colonial civil servants, judges and magistrates held their offices during His (or Her) Majesty's pleasure, which means that they could be removed at will and for any reason.⁶⁵ However, in practice there was maximum security of tenure of colonial judges and magistrates and their removal since 1870 involved reference to the Judicial Committee in London.⁶⁶

The colonial practice pertaining to the appointments and security of tenure of judicial officers was, quite rightly, abandoned at independence. Indeed, given the nature of African societies and politics,⁶⁷ it would have been imprudent to continue an arrangement whereby the executive would be responsible for the appointments and removal of judicial officers at his pleasure. A

constitutional guarantee was henceforth felt to be of utmost importance. The African nationalist politicians to whom political power was to be handed over had absolutely no experience of how to run the government, nor did they have behind them a tradition of self-restraint in the exercise of governmental powers as do their counterparts in Britain or the USA. Moreover, respect for the independence of the judiciary in a country like Britain is based not only on law, but also on tradition and convention which the politicians themselves observe as part of the political game. On the contrary, an African politician uninhibited by the influence of tradition on which respect for the independence of the judiciary is based in the known Western democracies, is readily to far greater temptation to interfere with the judiciary, especially in those countries with bills of rights, with judges having to decide "red-hot" political questions concerning the interpretation of the bill of rights and of the validity of laws enacted by the legislature. A judiciary which frequently, or even occasionally, gives decisions which have the effect of thwarting government policy will naturally become unpopular among politicians who are set to develop and modernize with all possible speed a backward society laid waste by years of colonial neglect. In these circumstances, without effective constitutional guarantees safeguarding the security of tenure of judges, and where the power of

appointment and removal is vested in the politicians, there is no doubt that the politicians will easily proceed to remove judges at their own will and convenience: therefore, when independence was granted in 1957 to Ghana, - the first British colony in ^{West} Africa to attain that status - the appointment of judges (other than the Chief Justice and Justices of Appeal) was taken away from the executive and vested in an independent judicial commission established directly by the Constitution.⁶⁸

The Chief Justice, on the other hand, remained to be appointed by the Governor-General acting on the advice of the Prime Minister.⁶⁹ The appointments of Justices of Appeal were also made by the Governor-General acting on the advice of the Prime Minister, but only after the Prime Minister has consulted with the Chief Justice.⁷⁰ The grounds for removal were also clearly spelt out in the Constitution, viz., misbehaviour or inability. The procedure for removing a judge was also expressly stated in the Constitution and required the executive's address to the Legislative Assembly to be carried by a majority of two-thirds.⁷¹

The Ghanaian innovation was improved upon by Nigeria. In addition to appointment by an independent judicial commission, and the stipulation of misbehaviour or inability as the only grounds for removal, a new procedure for removal was instituted, requiring reference of the matter to a local "judicial" tribunal, and further reference, should the local judicial tribunal find against the judge,

to the Judicial Committee of the Privy Council in London.⁷² Under the Constitution, the power to initiate removal proceedings lay in the executive, and during the pendency of the proceedings investigating a judge, (the executive (in effect, the Governor-General acting on the advice of the Prime Minister) could suspend the judge under investigation. However, such a suspension ceased if the removal procedure terminated in the judge's favour. Although these provisions were ^{copied} in most of the subsequent Commonwealth African constitutions except that in Zambia, the local judicial tribunal decided without any further reference to the Judicial Committee of the Privy Council in London.

ii) Provisions preserving independence of the judiciary under the Zambian independence constitution

Under the independence constitution of Zambia, in line with the rest of Commonwealth African constitutions, the President appointed the Chief Justice.⁷³ Puisne judges of the High Court and Justices of the Court of Appeal were appointed by the President acting in accordance with the advice of the Judicial Service Commission.⁷⁴ And the office of a puisne judge could not be abolished while there was a substantive holder thereof.⁷⁵ Removal of a judge of the Court of Appeal, or of the High Court, could only come about if proved that for the reasons of inability or misbehaviour the judge concerned could not perform the functions of his office.⁷⁶ And as in Nigeria (1960), the

initiative for removal proceedings lay with the executive - the President, in fact, who was made the appropriate authority to demand that a judge be investigated with a view to his removal. Having decided thus, the President was to appoint a tribunal to consist of a chairman and not less than two other members who held or had held, high judicial office.⁷⁷ During the pendency of the inquiry by the tribunal, the President could, of course, suspend the judge, but as in the case Nigeria, such a suspension ceased if the outcome of the investigation proved to be in favour of the judge.⁷⁸

iii) Impact of the introduction of the one-party state

Basically, the arrangements instituted at independence safeguarding the independence of the judiciary were retained in the single-party constitution of Zambia; but some notable events occurred in this area.

While retaining the Judicial Service Commission, a Constitutional Amendment of 1974⁷⁹ altered its composition. Before this Amendment to the Constitution, the Commission had consisted of the Chief Justice as its Chairman, the Chairman of the Public Service Commission, a judge of the Supreme Court or High Court designated by the Chief Justice, and one other member appointed by the President.⁸⁰ This latter must be a person who had held, or was holding high judicial office.⁸¹ So the position at

independence was that the Commission consisted of three judges and one non-lawyer. This composition was retained by the One-party Constitution, except that the number of the members of the Commission was increased by one, expressly by designating the Attorney-General as a member. The 1974 Constitutional Amendment referred to above, substituted the Secretary to the Cabinet for a judge of the Supreme Court or High Court. It also removed the requirement that the one member appointed by the President must be, or must have been a judge. As reconstituted, the membership of the Commission is now the Chief Justice, as Chairman, the Attorney-General, Chairman of the Public Service Commission, the Secretary to the Cabinet and one other member appointed by the President. So unless the presidential appointee is a judge or a former judge, the Chief Justice is left as the only judicial member of the Commission. Clearly, with this composition, the Commission now looks largely as an executive body with most of its members drawn from the executive side of government administration. As such, the Commission is now vulnerable to political control by the President himself and senior members of the government and party. The politicization of the Commission and its eventual subordination to the executive, constitutes one clear piece of evidence in support of the view that one-party governments in Africa do not tolerate pockets of power within the state, and hardly allow certain kinds of

government institutions to function independently of the executive. The tendency is to aggregate and concentrate power in the hands of the executive - the President, in effect - and there is no doubt that the vesting of such an important power as the appointments of judicial officers in someone or some authority other than an executive, or an executive-controlled authority, is incompatible with the attitude of a one-party government towards state power.

Perhaps the view that the process of the appointment of judges should exclude the influence of the executive ought not be entertained in the first place. It has been said, for example, that:

".....the office of a judge is a strategic one in the machinery of government, and in any country that professes democracy it might be argued that judicial appointments should depend on the consent of the people just as those of the legislature and the executive".⁸²

This is indeed the position in some states of the USA, where judges are elected directly by the people. (And in England, judges are appointed by the Lord Chancellor, himself a member of the Cabinet and a politician.) The process of direct election of judges by the people cannot be used in Africa for obvious "social" reasons. But even if the people themselves are not directly involved, it is arguable that in the name of democracy, the people's elected representatives in government should be associated with the process of the appointment of judges. This argument is articulated thus:

".....the executive.....has been chosen by the people and entrusted by them and by the Constitution with full responsibility for the government of the people. Its responsibility for government requires that, except for those elected directly by the people, it should have an effective say in the appointment of all important functionaries of the state. It is wrong to deny it this".⁸³

Perhaps we should reply to this argument by saying that what is at issue is not that the executive should not be directly involved in the appointment of judges, or that political considerations may not play a part in the whole exercise, but rather whether politicians by themselves are qualified to choose professionally competent persons of proven integrity to man the bench. Alternatively, can one trust politicians to be objective in the appointment of judicial officers? Quite naturally if the appointment of judges is left to the politicians, they will tend to choose those lawyers who happen to be their friends, or who are politically sympathetic with the particular party in power. This will naturally offend against the accepted view that "no one should be appointed a Judge for purely political reasons when he is not otherwise fitted for the office".⁸⁴ The idea of vesting the power to appoint judges in an independent body like the Judicial Service Commission, and constituting this Commission mostly of judges or former judges, is to ensure an objective selection of people who are well-qualified, competent and of proven integrity to accede to the important office of judgeship. Surely judges, or former judges, by virtue of

their longstanding association with lawyers, and the impartiality and objectivity in the handling of legal matters which is usually attributed to them, are in a unique position to undertake that task.

There is however, one instance under the Zambian Constitution whereby the executive appoints judges all by himself without consulting or acting on the advice of anybody. The one-party constitution, when it was finally adopted, had abolished the Court of Appeal and replaced it with the Supreme Court. Under the independence constitution, justices of appeal were appointed by the President acting in accordance with the advice of the Judicial Service Commission.⁸⁵ But under the one-party constitution justices of the Supreme Court are appointed by the President at his own discretion.⁸⁶ However, though this is so, the President cannot dismiss them except by the same procedure, which applies to the puisne judges when the question of removal arises. The procedure which we have already referred to, is again the appointment by the President of a tribunal consisting of a chairman and not less than two other members who hold, or have held, high judicial office. The tribunal reports back to the President, and advises him whether or not a judge ought to be removed. If the tribunal advises that a judge should be removed, "the President shall remove such judge from office". On the other hand, if the President is advised

by the tribunal that the judge ought not to be removed from office, he must comply with this.

However, the practice whereby a judge is appointed to a ministerial job or some other post in the public or para-statal service, is apt to undermine the security of tenure of judges, and therefore the independence of the judiciary. In Zambia since the establishment of a single-party rule, the President on two occasions had appointed a judge to become Attorney-General and Minister of Legal Affairs.⁸⁷ The judge was then asked to resign his judicial office in order to enable him take up the new job. Now, assuming that the government did not favour a particular judge (and since he could not be removed arbitrarily) it can easily employ this device of offering him another appointment and asking him to resign as a judge. Thereafter he could be dismissed from his new post and need not be reappointed as judge again. This has not happened in Zambia, but it certainly poses a possible threat to the security of the tenure of judges.

C. The Judiciary and Politics in a One-party State

Independence of the judiciary in a multi-party state would simply mean independence of the Courts from the influence of the executive and the legislature. But in a one-party state the "party" is as much an arm of the government as the executive and the legislature are - perhaps an even more important government institution than these two. As such, one would have thought that the concept of the

independence of the judiciary in a single-party state must embrace the notion of independence from the influence of the party as well. Unfortunately, this is not the way the notion is perceived in one-party states. In the first instance, it is argued that in a two or multi-party state membership of a judge to any political party is objectionable because it would operate to undermine the image of a judge as an impartial arbiter. Henceforth, he will be looked upon as identifying himself with the interests of one group, and in a case pending before him he will tend to promote the interests of his group. Even if in deciding such a case the judge concerned approached it without regard to the interests involved and gave an unbiased judgment but which happened to be favourable to his group, still in the eyes of the people the judgment would be regarded as interest-motivated: therefore, in a multi-party state it is understandable why judges must keep out of party politics.

When one comes to a one-party situation, the Dar es Salaam ICJ Seminar concluded that:

".....members of the judiciary should be at liberty to join the party provided that the party was a party of the masses with no unreasonable restrictions of membership, but should not be members of the policy-making organs of the party".⁸⁸

The justification for the desirability of judicial officers not to remain apolitical in a one-party system has nowhere been received with such a pointed elucidation as that offered by a former Chief Justice of Tanzania, Mr. Justice Georges. Since Chief Justice Georges has said almost everything that can be said on this subject, his account of it perhaps deserves to be quoted in full. He said:

"The concept of the judge as the neutral, belonging to no party in the multi-party democracy, can have no meaning here where there is one party. If he stands aloof, seeming to play the apolitical role which is supposed to be his, his motives will doubtlessly be suspected. A new way must be found.....

In the case of the elected judge or the English lawyer-politician appointed to the bench, whatever posture of impartiality may be adopted, it is difficult to believe that political convictions or prejudices acquired over a life-time and perhaps deeply encrusted can suddenly be jettisoned by the mere fact of appointment to the bench. What does happen is that the judicial officer's sense of professional integrity and his professional competence secure some objectivity in the handling of legal affairs, despite political commitment. It is my view that despite a political commitment to TANU, the judicial officer in Tanzania, once he is of the right calibre, can secure an equal degree of objectivity in his legal work. The main planks of TANU's beliefs..... are they can work [sic].

Seen in that context it seems to me that the judicial officer should, if he wishes to, become a member of TANU, and that at this stage this is perhaps desirable. Although politics is much concerned with the struggle for power and position, it is not concerned solely with that. In Tanganyika a tremendous task of educating people still lies ahead and no one should be better fitted to instruct on the essential part which the courts play in maintaining human rights and helping to secure for society that basis of order and respect for law without which economic advancement would be considerably hampered. This work can best be done from within the party which offers a platform largely respected because of its achievement in the struggle for independence.....

It is too much to expect the politicians to do that job for the judiciary. Largely we will have to do it ourselves so that a public opinion will gradually be created, permeating throughout the party, that the courts must be preserved because of the indispensable role which they play. The leaders at the top realize it and often stress it. But the task demands more than the occasional pronouncement. For these reasons, I see no harm and much good in party membership by members of the judiciary and the use of the opportunities which membership offers to show positive interest in helping the process of rapid national development and to stress the importance of the courts in the achievement of that goal".⁸⁹

Perhaps it could be said here that in the African traditional societies there was no equivalent of the doctrine of the "independence of the Judiciary", since starting from the Chief himself down to his councillors and headmen, dispute-settlement was in most cases handled by them. There was no division between the executive and the "judiciary". Chiefly functions included both law-making, law-execution and dispute-settlement. This perhaps went too far than could be accepted in a modern African society, but the trend in a one-party state in favour of judicial membership to the party has some traces of similarity with the position in the traditional societies regarding the relationship between the executive and the Courts.

NOTES

1. D.O. Aihe, "Neo-Nigerian Human Rights in Zambia", Zambia Law Journal, Vols. 3 & 4 (1972 & 1972), 43 at p.63.
2. B.O. Nwabueze, Presidentialism in Commonwealth Africa, ibid., p.239.
3. Dr. Kofie Busia, Africa in Search of Democracy, ibid., p.143.
4. ~~op. cited~~, Para.30.
5. S.12(3) of Act No.29 of 1972.
6. ^{op. cited} , Para.154.
7. Report of the Presidential Commission, ibid., Para.36.
8. Julius Nyerere, "Democracy and the Party System", Tanganyika Standard, Dar es Salaam, 1962, pp.24-25: quoted in Report of the Presidential Commission, ibid., Para.36.
9. Ibid.
10. B.O. Nwabueze, Presidentialism in Commonwealth Africa, ^{op. cited} , p.237.
11. S.5.
12. Presidential Commission Report 1965, ^{op. cited} , Para.37.
13. Report of the National Commission 1972, ^{op. cited} , Para.155.
14. Report, op.cit., Paras.37 and 38.
15. Report of the National Commission 1976, ^{op. cited} Para.155.
16. Constitution of UNIP (Annexure to the National Constitution) 1972, Article 5(1).
17. Report of the National Commission 1976, ibid., Para.155.
18. "One-party System", Spearhead, Vol.II of No.1 (Dar es Salaam, 1963).
19. "Special Report" in The Sunday Times of Zambia, January 9, 1977.
20. Ibid.
21. The Sunday Times of Zambia, January 27, 1977.
22. The Zambia Daily Mail, December 30, 1976.
23. "Opinion" in The Times of Zambia, January 27, 1977.
24. The Zambia Daily Mail, December 17. 1976.
25. The Times of Zambia, April 26, 1972. See also Jan Pettman, "Zambia's Second Republic: The Establishment of a One-party State", TMAS, 12, 2(1974), 231. She also asserts that the introduction of a one-party state in Zambia was opposed by many people.

26. See Report of National Commission 1972, ibid., Para.30.
27. Cap.268.
28. S.8, ibid.
29. On the subject of "integration of non-political organizations" in Ghana, Tangania and Malawi, see Nwabueze, Presidentialism in Commonwealth Africa, ap cited, pp.249-50.
30. Article 5(3) of UNIP Constitution (1972).
31. Report of the National Commission (1972) ap cited Para.163(c).
32. See Article 29(1) of UNIP Constitution.
33. See Article 32(3)(a), (c) and (d) of the Party Constitution.
34. Article 38(3) of the One-Party Constitution 1972.
35. Trade Unions and Trade Disputes Act, Cap.507, S.43.
36. Dr. Kofie Busia, Africa in Search of Democracy, ap cited p.167.
37. See The Times of Zambia, December 29, 1976.
38. Carl Friedrich, Constitutional Government and Democracy (Ginn and Co., London, 1946), p.146.
39. Dr. Kofie Busia, Africa in Search of Democracy, ap cited p.98.
40. In the "Watershed" speech, ZIS, Government Printer, Lusaka, 1975, p.23.
41. Article 37.
42. See Paras. 69 and 70 of the Report of the National Commission, ap cited
43. See Summary of Recommendations Accepted by Government, ap cited, p.9.
44. Vice-President Mainza Chona, see Hansard No.33, August 10, 1973, col.278.
45. For some comments on how the principle of collective responsibility may not be applicable in a one-party state, see David Morgan, Zambia's One-party Constitution, 1976 Public Law, pp.48-49.
46. President Kaunda, speech delivered to the National Council of UNIP, (June 30-July 3, 1975), ZIS, Government Printer, Lusaka, 1975, p.24.
47. On the performance of the new Parliament, see "Sunday Special" in The Sunday Times of Zambia, February 17, 1974.

48. Refer to Chapter 6
49. See Hansard No.36, July 31, 1974, Col.394. For the whole debate on the Bill see Cols.388-408.
50. See, for example, Mr. Kunda, M.P., Hansard No.33, July 4-August 30, 1973, Col.112.
51. Ibid.
52. Cap.17 of the Laws of Zambia.
53. S.3, ibid.
54. February 13, 1973.
55. Reproduced in Cherry Geutzel's materials on The Political Process of Zambia, V.11, p.91. See Parliamentary Debates, February 20, 1973, Cols.1309-1312 generally.
56. Address to National Council of UNIP, June 30-July 3, 1975, ZIS, Government Printer, Lusaka, 1975, pp.20-21.
57. See Annexure A of the Constitution of UNIP.
58. S.5(2) ibid.
59. ICJ Seminar on Human Rights in a One-party State, (Search Press, London, 1976), p.117.
60. The "Watershed" speech, ~~op. cited~~.
61. Presidential Commission, 1965, Para.108.
62. Report of the Presidential Commission on the Establishment of a Democratic One-party State, ibid., Para.108.
63. Statutory Instrument No.46, of 1972.
64. ICJ Seminar on Human Rights in a One-party State, ~~op. cited~~ p.111.
65. See decision in Terrell v. Secretary for the Colonies (1953), 5 LR.331.
66. For a detailed account on the removal of colonial judges and magistrates, see Sir Roberts-Wray, Commonwealth and Colonial Law (London, 1966), pp.493-500. Also, by the same author, "The Independence of the Judiciary in Commonwealth Countries", in Changing Law in Developing Countries, ed., Anderson, 1963.

67. See De Smith, "Judicial Independence in the Commonwealth", The Listener, January 15, 1959.
68. S.54(1) of The Ghana (Constitution) Order in Council 1957, S.I, No.277 of 1957.
69. Ibid.
70. S.54(2), ibid.
71. S.54(3), ibid.
72. Ss.105, 106, 117, 120, Constitution of the Federation 1960, and corresponding provisions in the Constitutions of the regions.
73. S.99(1) of the Independence Constitution 1964.
74. S.99(2), ibid.
75. S.98(3), ibid.
76. S.100(2), ibid.
77. S.100(3)(a), ibid.
78. S.100(5), ibid.
79. Constitution of Zambia (Amendment) Act 1974.
80. Section 104(1)(a), (b), (c) and (d).
81. Section 104(2)(a).
82. B.O. Nwabueze, Judicialism in Commonwealth Africa, op.cit. p.271.
83. Ibid., p.272. See also Robert Wray, op.cit., p.68.
84. Telford Georges, Law and Its Administration in a One-party State, op.cit. p.21.
85. Section 99(2) of the Independence Constitution 1964.
86. Section 108(1) of the One-party Constitution 1973.
87. Mr. Justice Annel Silungwe, of the High Court was appointed Attorney-General and Minister of Legal Affairs in 1973. And in 1978 Mr. Justice Fredrick Chomba, of the Supreme Court was appointed Attorney-General and Minister of Legal Affairs. Mr. Silungwe was later to be appointed the Chief Justice.
88. ICJ Seminar on Human Rights in a One-party State, op.cit. p.111.
89. Telford Georges, Law and Its Administration in a One-party State, ibid., pp.27-28.

PART IVCONCLUSIONS

CHAPTER 10

CONCLUSION: AN APPRAISAL OF THE PROBLEMS AFFECTING THE PROTECTION OF HUMAN RIGHTS IN AFRICA AND SOME SUGGESTED SOLUTIONS

In our conclusion it may be proper for us to reflect, very briefly, on some of the outstanding points which have emerged from our study of the operation of human rights within the context of the African political systems. It is not, however, intended to restate our views on the fine points of this subject, which have already appeared in the text, but rather to express our concluding remarks with reference to answering three closely related questions. First, is the question whether protection of human rights through the means of constitutional entrenchment in the form of a bill of rights has proved, or can prove effective in the circumstances obtaining in Africa today; secondly, assuming that constitutional protection of human rights in Africa has not proved efficacious, what are the factors explaining that alleged failure? Thirdly, and lastly, what means or devices do we see as perhaps being appropriate as alternative modes for the protection of human rights, given the operative conditions of Africa?

A. Has Constitutional Protection of Human Rights Worked Effectively in Africa?

The picture that finally emerges from our account and discussion on the subject of the constitutional protection of human rights and freedoms in Commonwealth Africa generally, is that in spite of the efforts exerted by both the Colonial Office and the local nationalist leaders concerned to insure their efficacy, bills of rights in their practical operations as apparatus to limit the actions of African governments had but a tenuous existence. Indeed,

one might be tempted to conclude that bills of rights in the practical politics of African states has but a "decorative" existence in at least the majority of African states. This would indeed seem to be a surprising finding, since, as we have shown in Chapter Two dealing with "the reception of the idea of human rights in Africa", it was due to the pressures of the local political leaders themselves taking part in the constitutional discussions in London that many bills of rights were bargained for to be included in the independence constitutions of these countries.¹ We have shown this at least with reference to the decision to incorporate a bill of rights in the Nigerian Constitution (1960),² and that of Northern Rhodesia (1963 and 1964 Constitutions).³ This fact is further confirmed by the fact that for a long period the United Kingdom Government had been opposed to the idea of writing a code of human rights in the constitutions of its former dominions and colonies before 1957, and that its attitude in that regard was relaxed after the Nigerian experience which we have described.⁴ No doubt, Britain's approach to the mode of the protection of human rights in its former dependencies might also have been influenced by an international enthusiasm urging for the constitutional incorporation of human rights after the Second World War - especially in the 1960's. But the point is that a demonstrable overriding factor in inducing that trend was the views impressed upon the Colonial Office by the political leaders of the colonial peoples themselves. It seems paradoxical, therefore, that once independence was won and political sovereignty placed firmly in the hands of nationalist leaders, they turned round and proceeded either to remove, or to attenuate the

intended effects of constitutionally entrenched bills of rights. This truth about the post-independence constitutional practice in the majority of African states may well serve to justify the assertion that in supporting the principles underlying the concept of civil liberties before independence, the nationalist leaders saw this no more than propaganda to discredit colonialism as being incompatible with human rights and of democracy in order to win international sympathy to their cause.

It is to be conceded, of course, that in some important aspects it was not the actions of politicians that prevented bills of rights from working effectively in Africa, but rather some operative political, economic, social, legal, etc., forces actively at work within the African societies which have proved inhospitable to court-enforced bills of rights.

Thus, out of the twelve Commonwealth African states, six - Tanzania, Malawi, Lesotho, Uganda, Nigeria and Ghana - have no constitutionally enforceable bills of rights. Again seven of these twelve countries - Kenya, Tanzania, Malawi, Lesotho, Sierra Leone, Swaziland and Zambia - are either de jure, or de facto, one-party states, or indeed, "no-party states". Three - Ghana, Nigeria and Uganda - are currently ruled by military governments. Only two - Botswana and Gambia - have had so far no serious constitutional upheavals resulting in discarding their bills of rights, or attenuating their effects in some radical manner. However, in the case of Botswana (independent in 1966), what may be seen as a serious qualification in its Bill of Rights was apparent with the passage (in 1969) of a constitutional amendment⁵ whose general effect

"was to revise the constitutional provisions relating to citizenship, to modify the Declaration of Fundamental Rights to facilitate government action in areas of air transport safety, mineral exploitation, trade unions organization and the application of customary law...."

But in the case of Gambia (independent in 1965), at least up to 1970, no amendment to its Bill of Rights had ever been passed, and so, to that extent this is the only stable Bill of Rights in the whole of Commonwealth Africa. In Kenya (independent in 1963) the Bill of Rights has been relegated from occupying the early Chapter III at independence to Chapter V. This may not seem to be a noteworthy development, but it does, however, show the declining attitude of politicians towards the primacy of a code of human rights as a constitutional institution. In these circumstances a pertinent question poses itself here as to why bills of rights, once before and at independence extolled as symbols of a constitutional democracy, have sunk into oblivion when in their places of origin in some European countries and in America they still command a central authority as the real pivot of democratic life. What are the problems, factors or variables that explain the ^{alleged} failure of African states to adopt the Euro-American model for the protection of human rights? In its wider context this question has been discussed in the light of the fact that reproduction of the Westminster model of political democracy in Africa has not worked well. Here, however, it is intended only to look at one aspect of this political democracy, namely, the institution of "human rights", and to discuss it with reference to the fact that its adoption in the African political situation has not been met with relative success.

B. Factors Explaining Alleged Failure of the Development of "Constitutionalism" in Africa Today

It will have become apparent from our discussions in the preceding chapters of this investigation that the subject matter of each of these chapters represents an exposition and analysis of one problem upon another bearing on the constitutional protection of human rights in Africa, and the extent to which these problems have operated to undermine the full enjoyment of human rights. These problems, as has been shown, manifest themselves in all sorts of forms, ranging from historical, doctrinal, legal to discussions of social, political and even economic contexts. Chapters One and Two, for example, have underlined the point that the principles of "human rights" which were later transported to Africa, trace their origins to the Western politico-philosophical tradition. It is true that, with the exception of the Nigerian Bill of Rights (1960), what have been called "Neo-Nigerian" bills of rights have displayed some attempts to adopt the Western-inspired principle of human rights to suit variations in the local conditions prevailing in the various former colonies of Britain. Though this is a correct observation, the fact still remains that in writing up these African bills of rights, the Colonial Office in London drew heavily from the Euro-American type of bills of rights. No doubt the authors of these documents were under the illusion that since these constitutional ideas have operated so well in their place of origin that the same results would be induced in their new environment. Britain might genuinely have been prompted into thinking this way, because after all, the "Westminster model" had previously been transplanted successfully to America and later to the older British dominions of Canada and Australia, and to a large extent to India.⁶ One

explanation for a successful importation of British notions of constitutional democracy in America and the older Commonwealth - i.e. Australia, Canada and New Zealand - is that the people who migrated and settled in those areas were of British descent, and were therefore brought up nurtured within the British political traditions and culture, and who, ipso facto, wanted to construct, and did indeed, still construct, their system of government on the English model with all its trappings and emphasis on the sanctity of the rights of an individual. Indeed, the evidence is that wherever the British adventurers of the Victoria era went and settled, they did not only carry with them the rights which they had attained in Britain, but also reproduced British systems of political, economic, and even social institutions. The fact is that apart from their geographical or physical separateness from mother Britain, they were in all essentials "Britons". Even then, one not infrequently encounters noticeable differences in the resultant constitutional structures of these British-derived systems. The story is, however, significantly different in Africa. While, by virtue of their being a part of the British tradition of political and even economic way of life, the inhabitants of America and the British dominions were, and are well qualified to operate a Westminster-inspired model, the people who took over the reins of political power from the Colonial regime in Africa were Africans themselves who had no idea about the Western system of government, except for a handful of intelligentsia who happened to have acquired Western education. Because of this it is arguable that the British ought to have perhaps placed a heavier regard to the differing cultural and

historical needs of Africa than was the case with respect to the white-ruled areas when devising constitutional instruments for her African ex-colonies. Because of this lack of vision, as evidenced through the mechanical importation into Africa of alien constitutional ideas, these ideas were bound to come in collision with the existing practical realities of Africa, challenging their claim as the most fundamental values of the new political order.

To start with the African leaders who were called upon to operate the parliamentary system of democracy, though reasonably Western-educated, were, of course, brought up in the traditional African way of life, both socially and politically. They thus shared along with the rest of the African masses a certain understanding of the nature of political power. The African conception of political power revolved around the institution of "chieftancy" and its relationship to other power centres and to the individual within the traditional constitutional set-up. In this arrangement the chief and the various subordinate chiefs combined all political power to themselves - a chief was an executive, a legislator and a judge. There is no doubt that the chief in the traditional setting was politically powerful and commanded enormous obedience and deference from his subjects. We have seen that one of the arguments advanced to justify one-party systems of government is that their rule marches well with the traditional mode of political governance. The truth is that the idea of organized opposition to government was quite uncharacteristic of an African traditional society, and even in modern times the notion is not readily understood by the majority of ordinary in Africa, including most of their

leaders. In saying this we are not in any way implying that an African traditional mode of governance was despotic. On the contrary, it can almost be said that the African form of government should have created a favourable ground for the development of constitutionalism within the context of the post-independence political order. Though no doubt African chiefs were powerful, African peoples had developed devices whereby a tyrannical ruler could be dealt with by dethroning him and forcing him to flee the kingdom. Further, the art of governance by discussion, tolerance of differing individual opinions, freedom of speech in indigenous assemblies, were all features of the traditional life.⁷ But, as Professor Cowen has observed:

".....it is important to remember that constitutional safeguards may take many forms, and that safeguards which are suited one day and age in a particular country may be unsuited to the needs of another generation in another country, or for that matter in the same country".

Thus, the institutions of government and safeguards which evolved under the traditional modes of political practice are inappropriate and out of context with the requirements of the political and economic objectives pursued by the modern industrial states of Africa. Consequently, though a remarkable degree of "constitutionalism" might have been attained within the socio-political context of these societies, this has been of little assistance, if any, in the perfection of political behaviour suited to the operation of modern governments. The precise point at which the traditional mode of political governance ceased to have overriding claim on the behaviour of the indigenous people was with the advent of the colonial rule. One would have hoped that with the advent of the

colonial regime and with the introduction of more advanced techniques of organizing societies politically, economically and legally, the ground would have been prepared for the subsequent development of "constitutionalism". What then has our examination of the role of the colonial regime in this respect point to?

Though no doubt the establishment of colonial administration played a significant role in at least introducing Africans to a more enlightened way of life, and especially in laying down conditions for the development of "democracy" patterned on the Western system of government, yet paradoxically colonial administrative practice had its part in retarding the development of "constitutionalism". To start with, the colonial regime having been self-imposed it was not based on popular acceptance by the indigenous peoples, and above all it was not subject to any popular democratic control either through parliamentary or judicial control. The courts during colonial rule were, for example, developed and indeed were looked upon by the colonial peoples, as instruments of colonial policy.⁹ They were staffed by judges recruited for colonial service, and more significantly, the colonial administrators themselves, such as Provincial Commissioners, District Commissioners, and District Officers, also served as judicial officers. Perhaps this practice, in the social context of Africa of that time, would be justified in that what mattered during this period was for the colonial regime to educate and civilize the otherwise backward peoples of Africa, and to steer their social outlook towards appreciating the merits of the new order. It was a task that required a practical approach in implementing the intended results of the

policy of "sacred" ^{trust} set by the colonial government. And in a situation where colonial personnel were critically lacking, it was only realistic that the available personnel should be deployed to undertake the various administrative tasks thrown upon the colonial government. In this situation to insist on the primacy of strict adherence to the dogma of private individual rights, to which the indigenous peoples were nevertheless entitled, would be a futile exercise since, in any case, given the social conditions which surrounded them, these rights would mean very little in practical terms. The important initial task which the colonial administration rightly perceived was to create conducive social, economic, political and even legal conditions favourable to the eventual enjoyment of those rights and freedoms. Even after the attainment of independence, many, if not all, African governments, are faced with the task of improving the social and economic well-being of their citizens and in that context argue that protection of human rights should not be sacrificed at the expense of the need to bring about material improvements in the life of their peoples. The point is that this task was even more pressing on the colonial regime which had to start from nowhere. Regrettably, this point is often ignored by those who frequently express the view that the colonial regime was autocratic, as if new governments now operated by Africans themselves are perfectly democratic.

The way we see the colonial rule to have failed to foster constitutionalism in Africa is that during the whole of its life it never established favourable conditions or practices upon which African governments could rely in operating a parliamentary form of democracy with an opposition ready to challenge its policies and

practices, of a government whose powers were limited by some formal rules as expressed through a constitution. Further, as we have seen, the colonial government was rather harsh in the implementation of the law of sedition and in the handling of "declared emergencies", and was clearly sensitive to criticisms levelled against its practices by colonial subject, especially at the height of nationalist politics. It ought also to be remembered that under the colonial constitutional scheme there was no bill of rights to which the actions of the government could be measured and to which appeal could be directed by a colonial subject for alleged deviation from a guaranteed right. Of course, it is inconceivable that a bill of rights could be incorporated in any of the constitutional instruments of any British colony at this time, since even in the international arena they had not attained the popularity they enjoyed after the Second World War - and even after this period they had not immediately captured the imagination of British constitutional advisers as possessing any political force.

For the purposes of validating what has been said with respect to the role which the colonial rule played in retarding the development of constitutionalism, and what we have to say of the retarding effect of the post-independence political events on the development of that idea, it is suggested to adopt the definition neatly framed by Professor De Smith, of what he considered to be the minimum requirements of the concept of "constitutionalism".

".....I am willing to conclude that constitutionalism is practised in a country where the government is genuinely accountable to an entity or organ distinct from itself, where elections are freely held on a wide franchise at frequent intervals, where political groups are free to organize and to campaign in between as well as immediately before elections with a view to presenting themselves as alternative government, and where there are effective legal governments of basic civil liberties enforced by an independent judiciary; and I am not easily persuaded to identify constitutionalism in a country where any of those conditions are lacking".¹⁰

Quite clearly none of these conditions were present in any of the colonial territories, except where there was present a large concentration of white settlers, and even here those political rights were available only among whites and perhaps to a handful of Africans.¹¹

However, the above remarks should not lead us to believe that the factor of "colonialism" comes high in the scale of those factors which we identify as being responsible to the flouting of democratic practice in post-independent Africa today. The real problems to the phenomenon lie in the post-independence nature of political and constitutional upheavals which have so far characterized the African political scene. Such phenomena as the emergence of military governments, of one-party states, the declining assertiveness of the courts as guardians of personal liberties, the diminishing role of parliaments (where indeed, these exist) as instruments of governance, and the general lack of the supporting infrastructure in the enforcement of individual rights. All these, and no doubt together with a range of other subtle forces, combine to undermine the development of constitutionalism in contemporary Africa. How then, within the context of De Smith's prescription of the essential features of constitutionalism, have these factors operated to affect the practice of constitutional democracy in Africa?

The subject of the protection of individual rights and freedoms under a military regime has not been discussed in the preceding chapters because it is obviously outside the scope of this enquiry. But for the purposes of now exercising an overall assessment of those factors that can be identified to be associated with giving effect to the retarding of the development of constitutionalism, the establishment of military government in some African countries and their performance is of great relevance to our subject under consideration. With the exception of some isolated instances, which we shall indicate in due course, it seems that the political conditions such as those created under a military government are incompatible with the legal protection of individual rights and freedoms, or more broadly, with the whole idea of constitutionalism. Before adverting to substantiating this proposition, it is first suggested to look at the extent to which military coups d'etat have been a frequent phenomenon in Africa.

By 1972, at least 30 out of about 40 independent African states had experienced either an army coup d'etat or a serious military disturbance.¹² Within Commonwealth Africa the following countries had experienced some coups d'etat: Ghana (1966, 1972); Lesotho (1970); Nigeria (1966, 1974); Sierra Leone (1967, 1968); and Uganda (1966, 1971) - "The Man on the Horseback", to use Finer's imagery, has indeed established himself firmly in the political saddle. The leaders responsible for engineering these coups are quick to explain that they took over the government because of tribalism in politics, and in the allocation of jobs; economic stagnation; regional imbalances in the distribution of the country's wealth and development programmes; corruption, and the arbitrary exercise of power coming dangerously close to dictatorships.¹³

However justified an army takeover may be, especially in the context of the African political experience, the effect of the establishment of a military regime means that those basic features associated with the idea of constitutionalism as postulated by De Smith, for example, are discarded. The experience in Africa ^{where} self-proclaimed revolutionary military governments have come into being is that invariably these regimes suspend all those parts of the previous civilian constitution which happen to be inconsistent with their own exercise of absolute powers. Thus democratic institutions such as parliament, the electoral process, and party politics, become the first targets for abolition. Courts, or the legal system in general, are normally allowed to operate as before, but not least subject to the superior exercise of decree power of the military council wielding the executive power. Further, none of these decree proclamations, such as those of Nigeria (1966) and Uganda (1971), expressly mention that a bill of rights of the previous civilian constitution be suspended. Thus, in a Nigerian case of Lakanmi v. Attorney-General of the West,¹⁴ the Nigerian Supreme Court attempted to adopt the view that a bill of rights had not been suspended as a result of the military coup. The court argued that unless the military government explicitly decrees otherwise, the bill of rights will be subject to judicial review. The court went on to explain that when Section 6 of the Constitution (Suspension and Modification) Decree No.1 of 1966 provided that the validity of a decree of the Federal Military Government or an edict of a state military government:

"Shall not be inquired into in any court of law".

this

"does not preclude the court from inquiring into any inconsistency that may arise (in between a decree or edict and the Constitution), but merely bars the courts from questioning the validity of making the decree or an edict on the ground that there is no valid legislative authority to make one".¹⁵

But surely as the Pakistani case of State v. Dosso¹⁶ illustrates, the destruction of a constitution by a military revolution or by a successful revolution for that matter, means that no individual can enforce against the revolutionary military government in its legislative capacity any of the fundamental rights guaranteed to him by the annulled constitution. For, as Chief Justice Muhammad Munir in this case explained:

".....if the (military) revolution is victorious in the sense that the persons assuming powers under the change can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law-creating force because thereafter its own legality is judged not by reference to the annulled constitution, but by reference to its own success".¹⁷

This case, which was decided on Hans Kelsen's theory of the juristic implication of a revolution,¹⁸ was also cited with approval by the Ugandan High Court in Ex Parte Matoru¹⁹ and by the Nigerian case of Lakanmi v. The Attorney-General (West), which we have referred to thereabove. Similarly, the Privy Council quoted the decision of the Pakistani Supreme Court with approval in the Rhodesian case of Madzimbamuto v. Lardner-Burke.²⁰ The position then is that rule by a military regime establishes a constitutional order which may not accommodate protection of fundamental rights and freedoms, at least through a legal means.

However, recent experiences in military-ruled Africa show that not all military regimes can be described as being in the least concerned with the prevalence of the rule of law and of respect for human rights and for democracy generally. The present military governments of Nigeria and Ghana have perhaps shown some characteristics of liberalism in preserving the democratic values that normally exist under any civilian constitutional system. It is true that even here democratic institutions, such as parliaments, elections, and organized political parties are not allowed to operate, but at least when it comes to the protection of human rights it cannot be said that these regimes are any worse than the existing civilian governments of Africa. After all, even with respect to the other remaining civilian governments in Africa, most of these are one-party states or "no-party states" as it were, in which the role of parliaments, organized political oppositions, and even the electoral process do not form the most important instruments of the political game in those countries. However, the point is that whether or not a regime is a one-party or a military one is irrelevant in assessing the protection of human rights - again the willingness and attitudes of those who wield power to see to it that these rights and freedoms are observed and respected are of great importance. Indeed, there are many cases where extreme violations of human rights are committed under civilian governments in many parts of the world, and, conversely, there are citable cases where self-proclaimed governments have turned out to prove exemplary in upholding the respect for human rights and dignity.

However, a military government can also help to bring into being intolerably extreme cases of flagrant dictatorial practices as the example of Uganda under Idi Amin shows. A report²¹ of an International Commission of Jurists on the question of the observance of human rights revealed that Idi Amin had embarked on a regime of mass killings of his own people, former government officials, intellectuals, and even his own army officers. He also brutalized foreigners who resided in his country, and even expelled most of them without due regard to their future and without affording them reasonable time to dispose of their properties. Perhaps these rare extremes can be explained on the ground of Amin's own personal propensity to cruelty, and his generally evil disposition. But this goes to confirm our proposition that what matters in the area of operating a government responsive to the maintenance of the rule of law and the observance of human rights is the attitude of the governors themselves. Elections ensure that the best people should run the government, and since the people who operate a military government are not elected, the chances of having "bad" personalities in those governments are higher than otherwise.

The practical effects of a government operated by a military regime on the preservation of fundamental rights and other democratic values, has some parallels with one operated by a one-party regime. The only fundamental difference between the two being that whilst a military government is self-imposed on the people, a one-party government is brought about after the people have been consulted, either through the means of commissions appointed by the government for that purpose as in Tanzania, Zambia, Malawi and Sierra Leone, or through a referendum as in Ghana (1964). However, there is no doubt

that in most cases these means of testing whether or not people are in agreement with the government's proposal to bring about a one-party state serves but a "decorative" role - behind the scenes the decision having already been imposed on the people, as is exemplified by the Tanzanian and Zambian experiences.²² In the case of Zambia, even in the only area where people were to participate in suggesting the form of a one-party democracy they wanted to see established in Zambia, their views were turned down by the government's final decision on the matter.²³ In the final analysis the details upon which the one-party constitution was devised in Zambia were those of the government and not of the people. In the second place, unlike a military regime, it is true that the one-party government's continued mandate to rule is often derived from the consent of the people obtained through the holding of elections between reasonably frequent intervals - however "semi-democratic" or undemocratic the conduct of the elections, and however inhibitive the electoral scheme may be in allowing competition between the aspiring candidates in presidential and parliamentary elections, and between candidates aspiring to membership of the central organs of the Party. We have already discussed the impact of a one-party state on human rights, but here it is suggested that we look at the electoral practice which is available under it, and to consider whether that practice is consistent with the right of the people to a popular choice of those who should run the government. Constitutionalism, or democracy at that, requires that the citizenry must have access to a genuine guarantee to participation in the political process, especially in the election of those persons who are to run the

affairs of their government. Our contention throughout this inquiry has not been that the establishment of a one-party state is in itself at variance with democracy - for it is a recognized and sacred principle that every sovereign people is entitled to choose any form of government under which it prefers to be ruled. Our contention rather, has been and is, that that system must be democratic in nature and in its practical operation, and in particular must foster the spirit among the wielders of power that the final say on their remaining in their positions ultimately depends on the people, as expressed through a fair and democratically conducted elections. For, to be sure, any objective assessment as to the extent to which human rights in any political situation are adequately protected or observed, must be looked at from the angle of how the entire constitutional system, both in its static and dynamic setting, operates. How then has the one-party constitutional system operated in Zambia with reference to the extent to which the electoral scheme under it fosters the practice of popular choice of candidates to the office of president, to parliament, and to membership of the central organs of the party?

To start with, the electoral scheme devised under the one-party constitution of Zambia (1973), requires that to be a candidate for parliament, one must be a member of the party, and must first of all be voted for in the primary elections by the local party officials.²⁴ At the conclusion of the primary elections, the names of all the successful candidates are to be submitted to the central committee. In any constituency to the National Assembly, the three persons with the greatest number of votes at the primaries qualify for nomination

as candidates for election to the National Assembly from that constituency.

".....unless the Central Committee disapproves the nomination of any such person on the ground that his nomination would be inimical to the interests of the State".²⁵

In other words, even if a person is among the three who receive the highest number of votes at the primary elections, this does not in itself automatically operate to confer eligibility on him for election to the National Assembly unless the Party through the Central Committee says so. In the first elections under the one-party constitution which were held in December 1973, the Central Committee exercised its power of "vetting" described above to prevent 26 successful candidates, including those who obviously commanded popular support in their own constituencies. And the Central Committee is not required to give reasons for its decision to exclude those candidates. Again, in the second parliamentary elections under this scheme held on 12 December 1978, 33 successful candidates were vetted out by the Central Committee from contesting parliamentary elections without giving reasons. This time, however, it became clear that those excluded from parliamentary elections happened to be the ones who were outstandingly critical of government and party activities and those of their officials. And in at least two instances, even those who were unopposed in their constituencies were vetted out for allegedly being uncompromisingly critical of the government in the previous House. But what is problematic is whether a candidate who is disabled from contesting parliamentary elections after having won the primaries, or who is unopposed

therein, can challenge in a court of law the action of the Central Committee as being unfair, and therefore unlawful. In other words, if, as the constitution stipulates, a candidate who in a parliamentary election has cause to petition in the High Court as to the validity of the outcome of the elections,²⁶ why should a primary election candidate - who in his case has, after all, won the elections - be deprived of this legal right? Although this situation has not arisen, nor has it indeed been discussed in Zambia, it seems that two views can be expressed in that connection.

In the first place, with the adoption of a one-party constitution in 1973, the Central Committee, or rather the Party itself has been elevated to assume the status of a constitutional organ - as such it is in all essentials an organ of the state. One would, therefore, like to hypothesize that the Party and the actions of its officials are subject to judicial review in exactly the same way as are all government agencies and the actions of public officials. However, even admitting this, the problem still remains, namely, that the power such as is conferred on the Central Committee is in the nature of a "discretion". Above all, the Central Committee in the exercise of that power does not need to give reasons. This means that, as in the case of the power conferred on the Minister of Home Affairs to deport an alien without giving reasons, under the Immigration and Deportation Act,²⁷ the action of the Committee cannot be questioned in a court of law. But here there is a further difficulty which is linked to our second view on this matter.

We have said above that in the case of parliamentary elections, an aggrieved candidate has the right to challenge the results of the elections in a court of law. It is arguable that the machinery of

primary elections under the Constitution is in all respects part of the process of parliamentary elections. The process of electing people to parliament starts from the holding of primary elections and ends with the declaration of results. It is therefore arguable that whatever goes wrong in between the process which results in an alleged unfairness committed against any candidate, could find its way to the courts for decision. In this context, therefore, the power conferred on the Central Committee, since it can also be abused to the extent of promoting unfairness to any candidate, ought also to be subject to judicial scrutiny.

The controlling role of the Party in the election of parliamentary candidates is also evident when it comes to presidential elections. The Constitution stipulates that the members of the General Conference of UNIP shall elect a person to the President of the Party, and such person shall then become the sole candidate in the election to the office of President.²⁸ The electorate's only role in the matter is confined to accepting or not accepting that candidate by casting a "Yes" or "No" vote. Further, the Central Committee of the Party has to agree on the candidates it will support for the office of the President before the General Conference is held.²⁹ Quite clearly under this arrangement, the Party is made the only effective selector of the President. It is true that the Constitution allows anyone who satisfies the prescribed requirements therein to contest presidential elections at the Party's General Conference. However, the experience in the last elections in Zambia (1978) under this electoral scheme shows that the concept of competition for election to the important office of president in a one-party state is indeed very much a theoretical possibility. In

the December 1978 elections in Zambia, three persons, including former Vice-President Simon Kapwepwe, a veteran nationalist leader in Zambian pre-independence politics and also former leader of the opposition party in parliament before the introduction of the one-party state, Mr. Harry Nkumbula, indicated their willingness to contest presidential elections at the General Conference of the Party. Before these elections were held, the Party amended the Constitution and the effect of that amendment was clearly to exclude these persons from contesting the presidential elections. Their subsequent petition in the High Court challenging the constitutional validity of the way the amendment was carried out, was lost.³⁰

Finally, the point should here be made that in a single-party state it is the Party around which all political activities in the country take place. The tendency has been to rule not through parliament or the cabinet, but through the Party and its central organs. And it is frequently asserted by the leaders that the Party and its central organs are supreme compared to those of the government like Parliament and the Cabinet. Thus the Central Committee of UNIP takes precedence over the Cabinet and one of its members, the Secretary-General, is in effect the Vice-President of the country and is consulted on the appointment of all Cabinet Ministers and other top government officials. Thus any effective protection of human rights in a constitutional situation, such as is postulated by a one-party state, must certainly also depend on the role the Party and its officials are willing to play in that regard. It is a function which cannot, as in a multi-party system, be left

solely to parliament or the courts. For the party controls, in a variety of ways, the activities of parliament and even those of the courts, not to mention those of the mass media.

Perhaps one of the most important factors central to the explanation of the alleged inefficacy of the protection of human rights in Commonwealth one-party states, is the extent to which the courts have proved to be ineffective apparatus in the actual enforcement of personal liberties. The evidence that has been adduced on the question of the role played by courts in the enforcement of individual rights and freedoms, point to this conclusion. With the exception of one instance³¹ in the whole of Commonwealth Africa, nowhere has there occurred judicial invalidation of a legislative measure. With respect to executive or administrative actions, it is true, especially in Zambia, that instances of such judicial invalidations are comparatively frequent. What are some of the reasons for this?

In the first place, the political power situation created by the fact of a one-party state or the existence of a dominant party holding power continuously presents one definite explanation. It must be remembered that the function of judicial review of executive and legislative measures precisely means that the courts are engaged in the exercise of setting limits to governmental powers vis-a-vis individual rights. In a multi-party situation this function is made easier to fulfil by the courts since the laws which they invalidate are not made by one government but by successive governments who, while temporarily in office, make those laws. And a court's decision

invalidating a particular law made by one government may be supported by the party which was not in government at that time. The situation in a one-party state is, however, different. There only one government makes all laws, and any invalidation of any of these laws can be seen or looked upon as purposely directed at exposing failure or failures of the government to act legally or constitutionally. Further, any apparent tendency by the courts to strike down legislative or executive actions as being unconstitutional on a somewhat frequent scale can easily be looked upon as an opposition to the government, and it is at this point that the judiciary can find itself drawn into political controversies. A judiciary functioning in a one-party state can, therefore, feel self-inhibited in taking up the kind of role the constitution bestows on it.

The other notable reason is the limitations imposed by the fact of the background of professional training under which lawyers in common law jurisdictions have undergone. All lawyers in Anglophone African states have been trained in the English legal tradition. In this tradition, and because of the nature of the English Constitutional practice, lawyers are not oriented to take up the type of role which a system of judicial review requires. Because, further, in Britain there is no written constitution coupled with the entrenched doctrine of legislative sovereignty, the courts have been removed from the arena of adjudicating upon the validity of statutes. Therefore little assistance in terms of deriving legal precedents from English Constitutional practice is available; unlike, for example, in criminal or many civil cases. In any case, courts in Zambia have decisively rejected altogether importation of foreign precedents as binding proposition in deciding constitutional cases.³²

There are also other discrete factors which bear upon the subject of an ineffective protection of human rights in Africa. In Africa, unlike Western democracies, there are just inadequate legal and social infrastructures necessary to support, and agitate for, a strict observance of civil liberties. There are, for example, almost no private organizations or associations formed for the purposes of agitation for the observation of civil rights to various groups of the society. In Western countries there are numerous organizations which represent the interests of one group or another in seeing to it that the rights closely pertaining to their members are observed, and in that regard play an important role in educating their members about their rights by providing them with the necessary information about this subject and even tendering some legal advice. Most of these organizations service such groups as immigrants, racial and religious minorities, women, etc. The trade unions, on the other hand, fight for the rights and interests of workers against management and government. But in Africa, especially with reference to Zambia and Tanzania as we have seen, trade unions are brought under the control of the government, and thereby cease to operate independently of government's influence. The existence of these private organizations ensures that the subject of the observation and enforcement of civil liberties is made active both in theory and practice. They act as practical means through which the various rights and freedoms under the bill of rights can be specialized upon through study by a group of individuals for the purposes of their practical implementations by the government, private institutions, and even the courts. In addition to the

existence of these organizations and the functions they perform in the enforcement of civil rights, the availability of a responsive legal profession in the Western countries has also made its contribution in the enforcement of personal liberties. The legal profession in the Western democracies, particularly Britain and America, shares the same view with their respective judiciaries in giving priority to the preservation of personal liberties. Though this is far from suggesting that legal professions in Africa do not share the same commitments in seeing that individual rights are protected against violations, it is fair to say that perhaps because they find themselves in a rather uncongenial political situation, these bodies have not been active in encouraging litigations in which issues about the constitutionalities of statutes allegedly infringing personal liberties are involved.

Added to the factor of the lack of the sort of legal infrastructure which an effective protection of human rights would require, is the problem inherent in the low level of the social sophistication of the African masses themselves. Perhaps it is often forgotten that the constitutional scheme for the safeguarding of individual rights which was handed down to many ex-British dependencies left it to individuals themselves to take the initiative in challenging any government action allegedly violating any guaranteed right. This means that the citizens themselves must be sufficiently literate, reasonably educated, and aware of the existence of these rights. Moreover, intending litigants must also have the financial means to undertake the usually costly litigations in the courts for the purposes of seeking redress against breach of their rights. These are factors that can be said to be almost non-existent in Africa.

People are largely illiterate, educationally backward, and above all poor. Most important is the fact that the majority of African peoples live in the "traditional enclave" and are largely governed by customary norms, and are indeed least affected by the new legal regime in their day-to-day lives, and it is only reasonable to say that they have not heard of anything called a "bill of rights" under the Constitution. So this leaves only the few educated and modernized elites who live in the urban areas, who can utilize the courts to enforce any official actions violative of the guaranteed rights.

The above are then some of the factors which, in varying degrees, have adversely affected the implementation of the principles underlying the concept of human rights in Africa. These factors, having been analyzed and having indicated their impact on the development of constitutionalism in Africa, a further relevant question poses itself, namely, can it, even at this stage, be validly argued that writing a bill of rights into the national constitution is the best or most effective method of protecting human rights in an African country such as Zambia. The experience of how bills of rights have operated in Africa would clearly lead us to return a negative reply to that question - and we have just finished adducing reasons to support this finding. What then do we consider to be perhaps the more realistic alternative means for the protection of individual rights in the context of an African environment?

C. Alternative Modes for the Protection of Human Rights in Africa

We have already concluded that in the context of the African situation protection of human rights through their entrenchment in the constitution and making the courts agents for their actual enforcement cannot work, or at least it has not proved to be an effective means of their protection, given the operative factors prevailing in Africa which we have just discussed above. Indeed, this may prove to be the surest way of destroying them completely. Some other ways must therefore be recommended.

It seems to us that the best approach to the problem would be to look for a system of protection which would not, in its practical operation, involve the challenge to the authority of the government in its exercise of the legislative and executive powers. Protection through constitutional guarantee of a bill of rights offends against this requirement, since when the procedure under it is invoked it invariably entails an individual or individuals to challenge the wisdom of a government policy or the validity of a certain law or laws passed by the government. What is even worse is the fact that the institution vested with the power to review government acts is itself not part of the government legislative or executive machinery - i.e. the courts which the constitution purports to remove from the political arena. This system for the protection of human rights has, of course, its ancestry in the Euro-American constitutional practice. On the contrary, a viable system for the protection of human rights in Africa must not present itself as controlling or checking the activities of the government, and of being apart from the political process as such. Such a system must recognize the unhappy practice of non-reviewability of state actions, at least to the extent of not

invalidating them at the instance of their repugnancy with some superior law; further, such a scheme of protection must also be part of the political process and must enjoy the support of the "party and government".

Here we submit that at least three institutions or devices would satisfy the requirements set out above as to a workable approach in the protection of human rights in Africa, and further that their potentials as instruments for the realization of individual enjoyment of person liberties should be exploited to the fullest. These are, protection through the means of "Directive Principles of State Policy", protection through the means of the institution of "Ombudsman" or "Ombudsmanlike institution", and finally protection through the political process - especially through the party. We now turn to a consideration of the favour of these techniques of protection as opposed to the technique of judicial enforcement

i) Protection through the Directive Principles of State Policy

One of the gravest shortcomings of all Commonwealth African constitutions (obviously again because of their origins in Western conception of constitutionalism) is that they all spoke only in terms of power and of rights, but never in terms of duties. By this approach these constitutions were merely emphasizing what governments should not do, mainly, it would appear, in the interests of private rights of which the right to private property was the most important. The effect of this approach was to limit the power of the new African governments concerned. In the context of the economic conditions of emergent states, it is arguable that the idea of constitutionalism

should not be understood only with reference to its classical substance or only with reference to the needs of political democracy. It is true that in earlier times a constitution was merely a political charter, the freedoms and safeguards which it ensured being of a political nature. Any attempt, if any, to solve economic problems through the medium of the constitution was, generally speaking, indirect and flowed from the political and civil rights and liberties which were recognized. This function of the constitution was appropriate when the state was mainly thought to be concerned with the maintenance of law and order, the the protection of life, liberty and property of the subject. Such a restrictive role of the state is no longer a valid concept - more so in a developing country. An emergent state is as much concerned to solve economic problems as it is to solve political problems. For this reason it becomes necessary that increasing attention be given also to the solving of economic problems through the constitution itself. This means that a constitution in an emergent state should devote a special chapter to the future economic and social structure of the state. It ought to stipulate that economic activity is one of the obligatory functions of the state. Incorporation of some form of directive principles of state policy in the constitution serves the objective in question by laying down certain economic and social policies which are to be pursued by the state: the idea being that these directive principles would impose certain duties or obligations on the state to make some positive action

in certain directions in order to promote and advance the much needed material welfare of the African masses.

Thus by including some form of directive principles on socio-economic policies in a national constitution, at least one major criticism against a bill of rights would have been removed, namely that in a newly-born African nation it is foolish to place such severe and vague limitations upon government that it may not be able to carry through plans for the provision of at least an adequate minimum of food, clothing and shelter; that there can be no point in having freedom of speech, and freedom to worship, and all the other worthy classical freedoms that we have discussed, if the people are not at the same time free from the pains of hunger and ill health, and the evils of illiteracy. Further, this approach would have satisfied the likings of many African politicians with a socialist outlook in the running of the new African states.

Regrettably, in the whole of the Commonwealth, only three countries have so far adopted the formula of writing directive principles of state policy in addition to the existence of bills of rights in their constitutions: these are India (1950), Pakistan (1963), and in the newly proposed constitution of Nigeria (1979) to be adopted in October this year (1979). The provisions are called Directive Principles of State Policy in the Indian Constitution, and Principles of Policy in Pakistan. Nigeria has preferred the Indian nomenclature of "Directive Principles", because here the

"word 'Directive' seems.....appropriate and necessary in order to emphasize that though not mandatory, they are a constitutional directive to the organs and authorities of the State to try to pursue the policies declared in the Directives".³³

There is a further advantage of directive principles over fundamental rights, which is founded on the legal nature of the former. Both in their place of origin - that is, in the Constitution of Eire (1922) and in the Indian and Pakistani Constitutions - directive principles are not made, like fundamental rights, justiciable. This means that no court can declare any legislation as being invalid on the ground that it does not conform to the spirit of any of the directive principles. The proposition that so far as the courts are concerned the directives are not enforceable, is explicitly clear from the Constitutions of Pakistan (1962) and India (1950). For example, the Pakistani Constitution provided that:

8(2) "The validity of an action or of a law shall not be called in question on the ground that it is not in accordance with the Principles of Policy, and no action shall be against the State, any organ or authority of the State or any person on such ground".³⁴

Similarly, by Article 37 of the Indian Constitution, the directives are made expressly unenforceable by the courts. Thus the Indian and Pakistani approach in the formulation of the directive principles is of some relevance here, in that it serves to remove the possible argument by some African framers of constitutions that inclusion of these directives of state policy in the constitutions concerned would create difficulties founded on the possibility that an individual can challenge the validity of a law as contravening the directives. By making the directives unenforceable this difficulty is avoided.

However, the Nigerian approach in the formulation of Directive Principles in its proposed civilian constitution to be adopted later this year (1979) has gone further than India and Pakistan in making these principles justiciable to a limited extent. The Constitution Drafting Committee, which was charged with the task of formulating a new civilian constitution for Nigeria, recommended firstly, the inclusion of Directive Principles in the new constitution (the first African country to have these principles in its constitution), and then went on to state that "...they should be justiciable to a limited extent", So that it will be possible for interested individuals "...to obtain a declaration from the courts as to whether or not some action or omission of the government is, or is not, a contravention of the Fundamental Objectives or Directive Principles". But, the Report of the Committee went on:

"Such a declaration if obtained, may be a ground for further action such as the impeachment of the offending functionaries but it should not be the ground for invalidating the particular action be it legislative, executive or otherwise".³⁵

However, by attributing the quality of partial justiciability to directive principles and making the judiciary the arbiter over such matters, would, as in the case of a bill of rights, lead to constant confrontation between the executive and/or the legislature on the one hand, and the judiciary on the other. This would be even an objectionable feature in a country where in addition to the existence of the principles in the constitution, there is also a bill of rights. The judiciary will be placed in a doubly difficult situation because it will

be called upon to adjudicate upon the compatibility of a government action or omission in relation both to a guaranteed right and to a directive principle in question. This is not the way we perceive the role which a constitutionally provided for code of directive principles could play in the enforcement of fundamental rights. In this respect, the extent to which the Indian directive principles have been put to use in the protection of fundamental rights is instructive to note.

a) Utility of the Directives in the Protection of Fundamental Rights: The Indian Example

In order clearly to appreciate the usefulness of the directive principles of state policy as substantive items of the constitution, they must, in the first instance, be distinguished from purely fundamental rights. A guarantee of fundamental rights in the Constitution enjoins the state from taking any action violative of the rights in question. In other words, they impose a negative duty on the state. On the other hand, directive principles will require positive action by the state. Moreover, such action can be guaranteed only so far as is practicable in the circumstances. The expression "practicable in the circumstances" obviously refers to the availability of resources which makes it possible to initiate any positive action in the implementation of welfare schemes. This is why the Pakistani Constitution had expressly provided that "...In so far as the observance of any particular Principle of Policy may be dependent upon resources being available for the purpose, the Principles shall be regarded as being subject to the availability of resources".³⁶ For this reason, it would

be unrealistic for any emergent state to make directive principles of state policy to be justiciable for the obvious reason of the scarcity of resources.

Perhaps one distinctive feature of directive principles under the Indian constitutions (and now under the proposed Nigerian Constitution) is that they are more widely worded than the declarations regarding fundamental rights. Possibly the reason for the general and flexible character of the language of the directive principles is to leave enough scope to the government to frame their policies from time to time, according to their own discretion and the circumstances prevailing. But the important point is that it may happen at times that a legislation passed in pursuance of a directive principle comes in conflict with a fundamental right - and more so on a guaranteed property right, because efforts to "socialize" an economy invariably involves tampering with private properties or assets. In such an event, the Indian Supreme Court had no difficulty in holding that a directive principle cannot override a fundamental right. In the case of State of Madras v. Champakam,³⁷ the Indian Supreme Court laid down the principle that:

"The directive principles of State policy which are expressly made unenforceable by a court cannot override the provisions in Part III which, notwithstanding other provisions, are expressly made enforceable by appropriate Writs, Orders or Directions under Art.32. The chapter on Fundamental Rights is sacrosanct and not liable to be abridged by an Legislative or Executive act or order, except to the extent provided

in the appropriate Article in Part III. The Directive Principles of State Policy have to confirm and run subsidiary to the Chapter on Fundamental Rights... That is the correct way in which the provisions found in Part III and IV have to be understood.

However, so long as there is no infringement of any Fundamental Right, to the extent conferred by the provisions in Part III, there can be no objection to the State acting in accordance with the Directive Principles set out in Part IV, but subject again to the Legislative and Executive powers and limitation conferred on the State under different provisions of the Constitution".

But the statements made above should not lead us to suppose that directive principles, even if included in the national constitution, would after all be utterly valueless from a legal point of view. It is the same Indian Supreme Court, in Re. Kerala Education Bill,³⁸ which has stated that:

"...in determining the scope and ambit of the Fundamental Rights relied on by or on behalf of any person or body, the court may not entirely ignore these Directive Principles but should adopt the principle of harmonious construction and should attempt to give effect to both as much as possible..."³⁹

This means that courts can, in fact, use the directives in interpreting the bill of rights. In the context of an emergent state directive principles, if substantively written in the constitution, should exist as qualifications to some of the guaranteed rights. They can, for example, be used as an index of what a public interest, or a public purpose, is intended to be. The point intended to be put across here is that when a law is challenged

as constituting an unreasonable restriction upon a fundamental right guaranteed by the constitution, the court must reject that contention if the law seeks to carry out an object desired by the directives; for a restriction which is intended to promote economic progress in an emergent state cannot be regarded by courts to be "unreasonable". Thus, in the Indian case of Buddu v. Municipal Board,⁴⁰ it was stated that prohibition of slaughter of cows, bulls and bullocks to enable the public to have sufficient supply of milk and to ensure availability of sufficient number of draught cattle for agricultural operations has been held to be a reasonable restriction under Article 19(6) in view of Directive Principles in Article 47 and 48 of the Indian Constitution. As the Court put it:

"If with a view to increase the milk supply and the production of foodgrains the Board by framing a bye-law placed a ban upon the slaughter of bulls, bullocks, cows and calves, the action was in pursuance of the policy of raising the level of nutrition and promotion of public health, a policy which is enjoined alike by the Constitution (under the Directive Principles, Art.47) and the UP Municipalities Act".

Again, the Directive in Article 48 of the Indian Constitution for preserving, protecting and improving livestock has been used by the Supreme Court to spell out the limits within which the state could prohibit the killing of animals, and thus impose restrictions on the trade of butchers under Arts. 19(1)(g) and 19(6).⁴¹

Further, it has been argued that:

"The national economy is no less important to a new nation than national security, and there is no reason why it should be any more objectionable as a ground for derogation in the bills of rights".⁴²

Only the 1967 Ugandan Constitution expressly recognized the interests of the national economy as a ground for derogation in the bills of rights. Moreover, in that constitution, a number of freedoms - freedoms of expression, correspondence, assembly, association, conscience and movements - were all qualified by the demands of the national economy - so long as the law authorizing derogation, and the action taken thereunder, was reasonably required in those interests and was justifiable in a democratic society.⁴³

Apart from the Ugandan example under the 1967 constitution whereby the interests of the national economy operated to qualify the enjoyment of some guaranteed rights, no similar provisions exist in any of the post-independence constitutions of Commonwealth Africa consulted for the purposes of this work. The best so far achieved in this respect is the inclusion of a preambulatory recital to the Tanzania Interim Constitution to the effect that it is the duty of the government to conduct the affairs of the State so that its resources are preserved, developed and enjoyed for the benefit of its citizens as a whole, and so as to prevent exploitation of one man by man. A similar recital was reproduced in the preamble to the Zambian one-party state constitution of 1973. In the latter

constitution, "Humanism" is also stipulated as the philosophy of the nation.

On the face of it, one may be tempted to think that these preambulatory recitals calling upon the state and government to appropriate the national resources along certain ideological lines (also stipulated in the preamble) are, in fact, binding on the government. The position is that a mere declaration in a preamble has no legal effect. At least in the British constitution, a preamble "forms no part of a statute, and so can create no legal rights or obligations, though its spirit may be a guide in the interpretation of the substantive provisions".⁴⁴ So whatever effect the recitals on the economic organization in the Tanzanian and Zambian preambles have, can only be of a moral and educative one. In fact, the framers of the Tanzanian constitution themselves recognized the "emptiness" of a mere recital in a preamble, and therefore urged that in addition to it, "everything possible should be done to win for these principles a strong commitment from the citizens".⁴⁵ Our view is that the interests of economic development, being factors of great importance in emergent states, should find a substantive place in the constitutions of these areas, and should exist as the framework within which the guaranteed rights, including the protection of property rights are to be interpreted.

ii) Protection through the institution of "Ombudsman"

Like protection through directive principles, the institution of "Ombudsman" has the potential of securing the protection of individual rights in a manner that would not assume the form of reviewing governmental actions or measures as does a constitutionally entrenched bill of rights. Thus, in the work of the Tanzanian Presidential Commission on the Establishment of a Democratic One-Party State, the institution has

"...the possibility of providing some safeguard for the ordinary citizen which will not have the effect of limiting the actions of Government and Party in a way which could hinder the task of nation-building".⁴⁶

However, unlike in the case of directive principles, the institution of Ombudsman has been adopted in one form or another in many parts of the world, including some Commonwealth African countries. The institution was first established in Sweden in 1809. The idea of Ombudsman, however, did not travel outside that country for about 150 years. It was only with the adoption of the institution by Denmark in 1954 that the idea of Ombudsman started to be exported outside the Scandinavian countries. The institution has, to date, been statutorily adopted in one form or another by Norway, New Zealand, Australia, the Canadian provinces of Alberta and New Brunswick, Britain, Hawaii, Guyana, Mauritius, India, USA, Malaysia, Ireland, and Switzerland. And, no doubt, many countries will join in the adoption of the idea in their constitutional systems. In

Commonwealth Africa, however, it was Tanzania which established the first Ombudsman in 1966,⁴⁷ called the Permanent Commission of Enquiries (the PCE). Tanzania was followed by Ghana in 1969. In the 1969 Ghanaian Constitution, reverting the country to a civilian rule, provision was made for the office of Ombudsman although at the time of the military coup in January 1972, those provisions had not been implemented.⁴⁸ In its one-party constitution of 1973, Zambia has also since established the institution of Ombudsman known as the Commission of Investigation (the CI).⁴⁹ It is perhaps significant to note that while in Tanzania the PCE is the only institutional mode to which an individual has recourse in defence of his rights, in Zambia and Ghana (1969-73) there is/was in addition a justiciable bill of rights.

The ultimate objective underlying the establishment of the Ombudsman institution wherever this has occurred, is basically the same, namely, to protect an individual citizen against maladministration, or against administrative partiality, favouritism, or against unfair and unjustified decisions that frequently arise from the business of administration. In this respect Mr. Chomba, the first Zambian Ombudsman summarized what he saw to be the contribution the institution would make to the country's democratic life. He commented:

"...in so far as the Commission will have a duty to see that the bureaucracy does not act arbitrarily to the detriment of the citizen, it can be said to have been established for the protection of human rights. In the process of protecting such rights it will simultaneously promote the rule of law. Moreover, since in its remedy-seeking role on behalf of the common man the Commission will contribute to good government and as good government is a sine qua non in the advancement of

democracy, by having a right to make complaints against public officials, the common man will thereby participate immediately in the system of government. In this way the 'participatory democracy' proclaimed by the Constitution will be made a reality".⁵⁰

The Zambian four-man Commission for Investigations is patterned on the same lines as the Tanzanian Permanent Commission of Enquiry in terms of its functions, jurisdiction, and the relationship to the President and the National Assembly.⁵¹

There are of course, differences between the two sets of institutions which can now be found in the published literature on this subject.⁵² Here, though, we are not primarily concerned with an examination of the law specifying the structural and procedural aspects of these institutions than their suitability as alternative techniques for the protection of individual rights, it is worth noticing some few such features of the CI.

The Commission of Investigation consists of the Investigator-General, who is its chairman, and three other persons appointed by the President in his discretion. The Investigator-General is also appointed by the President, but only after "consultation with the Judicial Service Commission". A person appointed to the office of Investigator-General must have been a former judge or a person qualified for appointment as a judge of the High Court.⁵³ Once appointed he is invested with all the security of tenure of office equivalent to that which applies to a judge of a High Court or Supreme Court.⁵⁴ His removal from the post will require a resolution of the National Assembly supported by two-thirds majority, followed by an affirmative recommendation

by an investigating tribunal of three persons appointed by the Chief Justice. The Tanzanian PCE is composed of a Chairman and two Commissioners who function as a single body, and are appointed by the President. No particular qualifications by which the President should select Commission members are required. It is quite obvious that the insistence under the Zambian Constitution that the Investigator-General must possess some legal qualifications and must be appointed by the President in consultation with the Judicial Service Commission, was the desire for the Investigator-General to be appointed solely on merit and the necessity that any person in "such a potentially sensitive position" must command the confidence of the political leadership - especially that of the President. While in the Western democracies all political activities are to, a considerable extent, supervised and controlled by parliaments, in the presidential regimes of African countries, the president is the real authority on whom all government institutions depend for their support. The institution of Ombudsman cannot be an exception to this general rule. Thus, one of the salutary aspects of the Ombudsman's successful adaptations in the presidential regimes of Africa, at least in those of Zambia and Tanzania, has been to make it part of the administration and above all to make it responsible to the President - indeed to make it a "presidential watchdog of the administration".⁵⁵ In both Zambia and Tanzania, therefore, the President has considerable influence over the activities and operations of the CI and PCE respectively. Presidential controls over these

institutions are exercised, apart from the power of appointment, by the power to initiate or terminate investigations, and by the discretion to implement or not to implement sanctions in accordance with their recommendations. It is clear, therefore, that in these circumstances any successful or effective operation of the Ombudsman will depend, to a large extent, on the support which the President will be willing to give it.

Coming to the scope of the Zambian Commission's power over acts which can lead to its investigation, this is pretty wide, and covers:

"...any matter of individual injustice or administrative abuse of power and authority involving corruption, tribalism, nepotism, intimidation and all forms of discrimination".⁵⁶

The range of institutions and public officials into whose conduct, acts and decisions the Commission may inquire is also quite vast and broad. These include:

- "(a) any person in the service of the Republic;
- (b) any person holding office in the Party (i.e., UNIP);
- (c) the members and persons in the service of a local authority;
- (d) the members and persons in the service of statutory corporations, bodies or boards, including institutions of high learning, established wholly or partly out of public funds;
- (e) the members and persons in the service of any commission established by law".⁵⁷

The only significant exceptions outside the investigatory jurisdiction of the Commission is indeed the President himself, and the whole range of institutions and persons in the private sector.

At this point we should now come directly to consider the central theme of this part of the inquiry, namely, the argument that the machinery of the protection of individual rights, such as is postulated by the institution of Ombudsman, is of much practical value, given the conditions of African states than the one afforded by a court-enforced bill of rights. In discussing this subject the fine arguments advanced by the Tanzanian Presidential Commission on the Establishment of a Democratic One-Party State against the adoption of a bill of rights in preference to an Ombudsman-like institution (the PCE), which we have already discussed in the last chapter, should be recalled.⁵⁸

On more than one occasion in this inquiry we have said that the device of judicial enforcement of personal liberties in a country like Zambia, or indeed in any sub-Saharan African country, can only be utilized by a handful of individuals and is hardly of any use to the rural population in remote villages, or even by the majority of urban dwellers working in the modern cities. The technicalities of law and court procedures and their costliness make the device or redress through the courts out of the reach of the masses. This, therefore, constitutes one explanation of why there have been relatively few cases brought before African courts in which fundamental rights decisions have been sought. Indeed, it is only in the exceptional cases that the procedure for the enforcement of the protective provisions under the bill of rights have been invoked, and even when this had occurred, the majority of the fundamental rights cases do not end up in favour of the applicants. There are many reasons

for this - for example, the fact that there are just too many exceptions to the guaranteed rights under the African bills of rights, with the result that they cover almost every conceivable situation of controversy; also the language of the protective provisions are too vague as to result in giving the courts wide discretion in their interpretations of these provisions, so that judges can easily manouevre their way out from giving decisions which may be looked upon with disapproval by the government. But the real problem or handicap besetting the enforcement of individual rights is the fact that by far the largest segment of governmental powers which public officials exercise is in the nature of "discretionary powers", coupled with the fact that by their very nature the exercise of these powers are not easily susceptible to judicial control.

The vesting of vast discretionary powers in public administrators at all levels of government function is indispensable in every country, but is even more compelling in a developing country like Zambia with ambitious objectives to improve the social and economic well-being of the people. As the Presidential Commission in Tanzania again noted:

"...it is inevitable that many officials, both of Government and of the ruling Party, should be authorized to exercise wide discretionary powers".⁵⁹

And according to the first Chairman of the Tanzanian Permanent Commission of Enquiries:

"Tanzania is actively engaged in dynamic development projects designed to eradicate poverty, disease, and illiteracy.... The executive has a vital part to play in achieving these advocated national ends, and consequently many administrative have been given wide powers to make decisions. Such decisions...could have very serious consequences for the individual".⁶⁰

The problem, however, is that even if a decision arising out of the exercise of discretionary power may result in arbitrariness or unfairness to an individual or a group of individuals, the courts are powerless (save to a very restricted extent) to intervene in defence of the interests of the individual or individuals. The Zambian fundamental rights case of Harry Nkumbula v. The Attorney-General,⁶¹ discussed already, has laid down that the exercise of discretionary powers:

"...cannot be challenged unless it can be shown that the person vested with the power acted in bad faith or from improper motives or on extraneous considerations or under a view of the facts or the law which could not reasonably be entertained".⁶²

And there are many cases both under the bill of rights in the constitution, and under many statutes, where the vesting of discretionary powers enables government functionaries and public officials to take a prescribed course of action if satisfied that "it is necessary in the public interest". In all such cases the courts have held that they cannot go behind a statement by the competent authority (in the absence of proof of bad faith) that it was satisfied that the statutory condition for the exercise of the power existed.⁶³ Further, in another, fundamental rights case of Kachasu v. Attorney-General,⁶⁴ the Zambian High Court has held that it has no power at all to

inquire into the reasonableness, the policy, or otherwise the wisdom of an impugned legislative measure for the purposes of determining its consistency or inconsistency with a guaranteed right under the bill of rights.⁶⁵ It is thus clear that the exercise of discretionary power by a government agency or agent may be unreasonable or arbitrary, and yet the courts cannot provide any relief.

Shortcomings in the technique of parliamentary control over the activities of a one-party executive are even more apparent. We have already examined these in connection with our discussion on the role of parliament in a one-party constitutional set-up. Suffice to mention here, however, that there is no such thing as "parliamentary supremacy" in a one-party state, but only "executive supremacy". Zambia has gone even further than this by enacting an amendment to the constitution⁶⁶ in 1975 to give effect to the principle of "Party supremacy". By this amendment (and, of course, through other earlier provisions in the Constitution and other legislation) the Party, through its organ (the Central Committee and the National ^{Council}, and through its President, who is also the President of the country) controls all political activities in the country. Parliament, in particular, is brought under complete control of the Party.⁶⁷ It is, to use President Kaunda's own words, "an arm of the Party".⁶⁸ But as we have also said elsewhere, the Zambian first one-party parliament (1973-78) had shown a record of independent criticism against certain government actions and policies. However, questions in parliament and parliamentary debates have not been directed particularly at cases of

maladministration than at cases of government policies in general. For one thing, there has been a complete lack of contact between the masses and their parliamentary representatives, and hence the use of parliamentary control in the realm of exposing cases of maladministration and abuse of power is very limited.

Further, in a multi-party state the problem of abuse of power by the whole governmental machinery could, to some extent, be controlled through the political process, such as is available through the democratic procedure requiring the governors periodically to go before the electorate to obtain a fresh mandate for their continuance in power. A government with a poor record of political accountability and whose administration has been publicly exposed, either through the opposition in parliament or through a vigilant, critical and independent press such as exist in the Western democracies, will have its chances to win the next elections diminished. This, no government would like to face, and hence the reason for its supposedly strict adherence to run the affairs of government according to established rules, procedures and political convention. In a one-party state, on the other hand, no threat founded upon defeat of government through an electoral process ever exists. Individual members of parliament, including cabinet ministers, may lose elections, but the same government continues. Moreover, the fact that individual ministers may lose elections has nothing to do with the performance or record of the government. However, the device of political control

over the administration has its own inherent drawback since it leaves the problem of abuse of power by the individual administrators intact in the sense that unlike a politician, an administrator is not under the watchful eye of an electorate for he does not have to seek a re-election.

Finally, redress of individual grievances through established administrative procedures such as appeals to administrative tribunals or appeals to higher authorities which many statutes establish, also have their shortcomings. Far from suggesting that these techniques might not have provided relief sought from them in certain comparatively few cases, it is quite obvious that the bulk of the population are quite ignorant of their existence, and therefore their use has not been available to many. It is only the few enlightened ones and those whose attention can be drawn to the existence of these procedures that are in a position to utilize them for the purposes of obtaining the relief sought.

It is because of the existence of these limitations and drawbacks inherent in the systems of judicial, parliamentary, political and administrative controls over administrative actions that calls for the need to formulate up-to-date procedures which will afford justice to ordinary citizens in a more realistic way: that is, procedures which would be non-technical, informal and easily usable by the ordinary people without being unnecessarily inhibited by financial or literary or other factors. Moreover, there is a need to provide redress in circumstances where the exercise of administrative discretion has been tainted with bad faith or improper motive

or where unreasonableness of an administrative decision can clearly be established. The institution of Ombudsman, properly tailored to suit the local requirements of the adopting country, would, it is hoped, provide such a machinery,

In a newly-born developing country like Zambia, administrative abuse of power, administrative arbitrariness, or maladministration in general, is admittedly bound to be practised on a larger scale than in a developed country with an established tradition of political and administrative behaviour. To start with, most of the administrative personnel are ill-trained (if they are trained at all), inexperienced, and in most cases "bound by traditional or local loyalties inimical to the national interest".⁶⁹ This is also true of politicians themselves. But the situation of trained manpower was most ^{critical} in Zambia, even by African standards. At independence in 1964 there were only one hundred Zambian university graduates, and less than 2,000 holders of the General Certificate of Education.⁷⁰ The establishment of the University of Zambia in 1966, and the opening of a number of colleges to train Zambians in all fields of professional skills, has of course, eased the problem of manpower, but only to a limited extent. Yet soon after independence the government had already embarked on a comprehensive Zambianization programme designed to replace the expatriate staff from the Civil Service and the parastatal sector with the local people. Thus the Zambian public service has just emerged within the last decade or so. Yet this is the very administration which has provided the personnel in whom

vast powers have been lodged under a mass of social legislation that has filled the statute book in Zambia since independence. It is thus not out of the question to suggest that instances of misinterpretations, and therefore misapplications, of the powers under this legislation would be fairly frequent, with disastrous consequences for the rights of individuals. It therefore seems imprudent to leave ordinary citizens at the mercy of such administrators, since cases of incompetence, ignorance of the administrative procedures and rules applicable, or indeed unawareness of the limits of the administrator's own legitimate powers in the execution of administrative functions, would be commonplace. The function of the Ombudsman in such situations would not only be confined to correcting the inevitable administrative errors, omissions, and mistakes, but he would also conveniently assume an educationalist role in acting as an educator to the administrators concerned by pointing out these errors to them, and indicating the proper way of dealing with those cases in the future by, say, drawing their attention to established procedures or rules.

It follows from this that one of the immediate tasks that would fall upon an Ombudsman operating in a new nation, would be to ensure that the administrators perform their functions in accordance with the established rules and procedure: for this reason in cases of offending administrators, reliance cannot be put merely on prosecutions for violations, especially when dealing with a relatively inexperienced administration. The administration should be taken as being in a state of acquiring

the necessary experience, and therefore methods of persuasion, warning, suspension, conciliation, etc., would need to be applied in appropriate cases.

There is, however, a further dimension to the question of our earlier assertion that administrative abuse of power or authority would be practised on a comparatively large scale in an African state. The African nation which has just come into existence with the attainment of political independence, is made up of a conglomeration of tribal or ethnic groupings, and we have shown how deeply people express their loyalties to their respective tribes and towards their own tribesmen. During the colonial era the question of tribalism or bias based on tribal allegiance was non-existent among colonial administrators since they had no stake in the local politics of the country. Even among the local administrators of this period little, if any, tribalism has been heard to have been attributed to them. This is understandable since, in any case, their conduct in the course of their official duties was under the watchful eye of their white bosses. After independence all positions held by the departing colonial administrators were filled by the local people who naturally possessed personal interests (and those of their families, clan or tribe or region) to protect and promote within the emergent social order. Thus tribal loyalties or bias have been made a living reality not only by the day-to-day practices of the ordinary people, but also more overtly by politicians themselves, who have played a major role in promoting inward feelings of "tribal identity" among their respective tribal groups. Indeed, the element of tribalism has

has been undoubtedly the most ugly aspect of African political life. It is this practice of tribalism and its associated derivatives of nepotism, ^{favouritism} and corruption that has been carried into public administration in many of the African countries. The impact on the rights and interests of individuals of an administration with those leanings and inclinations is quite obvious. The Zambian leadership was aware of this problem and so the National Commission on the Establishment of a One-Party Participatory Democracy recommended, and government accepted, that the Commission of Investigation to be established should have power to investigate:

"...any matter of individual injustice, or administrative abuse of power or authority involving corruption, tribalism, nepotism, intimidation and all forms of discrimination..."⁷¹

The point must be stressed here, that it is abuses of power involving tribalism, nepotism, or favouritism in the appointment to jobs, promotion to or wrongful dismissals from jobs, discrimination in the issuance of trading or other licences, grant of loans, etc., that constitute the most immediate grievances of individuals against the administration. Looking at the nature of cases received and dealt with by the Commission for Investigation in Zambia during the years 1974 and 1975, the bulk of the complaints against the various public officials and institutions pertained to allegations of tribalism, nepotism, or irregularities in the appointments to jobs; complaints about promotions in jobs and dismissals from jobs; complaints about the fixing of salaries or failure to award employment benefits in the nature of allowances, terminal benefits, etc.:

irregularities in the allocation of accommodation; political victimization; detention on false charges of treason, and being tortured by the police while in detention.⁷²

In many of these cases it was clear that the complaints in question arose out of sheer ignorance on the part of the complainants regarding the true position of the procedure or rules applicable. In these circumstances, the Commission can also function to legitimize the actions of the administration, and thereby protect it from unfair and unjustified public criticisms against it. Conversely, in cases where a complaint is found to be justified, and the error in question is detected and corrected, the Commission has often directed that the authorities concerned should work out a comprehensive scheme for dealing with similar cases in future. It is thus this corrective and supervisory role which the Ombudsman fulfils in the area of public administration which is found to reduce the incidence of unfair administrative acts against individual citizens.

Some observations can now be made on the question whether protection of individual liberties through the technique of the institution of Ombudsman, such as exist under the Tanzanian and Zambian constitutional systems, secures protection of individual liberties in a really tangible way, as does a constitutionally entrenched bill of rights. Under a bill of rights, such as are found under Commonwealth African constitutions, all the known traditional civil liberties are enumerated and guaranteed and can be enforced by superior courts at the instance of any individual alleging violations of any of them in relation to him.

On the other hand, the institution of Ombudsman, except in the case of Tanzania, was not specifically instituted to function as the guardian of personal liberties in the sense in which the role of courts in that respect has been formally understood. The primary task of the Ombudsman is to correct instances of administrative abuse of power, or arbitrariness by the administration, and its role in the realm of the protection of individual rights arises only in so far as an administrative act complained of also infringes upon a recognized right of an individual. In other words, the Ombudsman's role in securing protection of individual rights is only "peripheral" or "incidental" to its supervisory function as guardian of individuals' interests in the face of the administration's possible abuse of power or authority. An individual, for example, cannot go to the Ombudsman to seek remedy with the complaint that his freedom, either of expression, of assembly and association, of conscience, of movement, protection for home and property, etc., has been infringed. It is, of course, true to say that depending on the nature of the alleged violation, the Ombudsman can render redresses in cases where any of these rights and freedoms have been infringed - for example, in cases of discrimination on the grounds of race, tribe, political opinions, etc.; or where an individual has been wrongfully detained by the police; or where his property has been seized by an unauthorized official; etc. However, redressal of some of these violations may not, and frequently will not, be within the jurisdiction of the Ombudsman, since they involve declaring null and void some legislative or executive act, or some declared government policy measure.

We have seen that it is outside the Commission's competence to entertain complaints against presidential or legislative acts on any ground whatsoever, including those of their alleged repugnancy to some recognized individual rights. In Zambia, for example, all detention or restriction orders are made by the President, and it cannot be doubted that these measures constitute a formidable threat to personal liberties - yet they cannot be reviewed by the Ombudsman. However, the procedure under the bill of rights provides means of affording relief against presidential acts of this nature. In Tanzania no such problem would occur, because detention orders there are effected by the Minister responsible for internal affairs, and even by some senior regional administrative officers. All these officials fall within the investigatory jurisdiction of the PCE.

Further, a large area in which intervention by the Ombudsman would be required in controversies involving personal liberties is outside the jurisdiction of the Zambian Commission for investigation. The Commission for Investigation Act, for example, provides that the Commission shall not conduct any investigation in respect of:

- "(a) any matter in respect of which the person aggrieved has or had a right of appeal, reference or review to or before a tribunal constituted by or under any law;
- (b) any matter in respect of which the person aggrieved has or had a remedy by way of proceedings in any court of law".⁷³

Provided that the Commission may conduct an investigation notwithstanding that the person aggrieved has or had such a right of remedy if satisfied that in the particular circumstances it is not reasonable to expect him to resort or have resorted to it".

These provisions undoubtedly confer on the Commission a discretion to entertain or not to entertain complaints in which the allegation is that a governmental authority has transgressed upon a right or freedom available to an individual, in spite of the fact that conflicts of this nature are usually adjudicated upon by the ordinary courts. Naturally, in deserving cases in which an individual may be inhibited to have recourse to court justice due to financial or other handicaps, the Commission would most likely take up the complaint. The point, however, is that this still does not remove the difficulty founded upon the fact that the Commission has no power to take up and investigate complaints where the administrative act under attack takes the form of a legislative or presidential act, or the form of a party/government policy, or anything done under the authority thereof. In Zambia, but not in Tanzania, the only consoling factor is that the Commission for Investigation operates side by side with a constitutional bill of rights, with the result that an individual aggrieved of the type of acts stipulated above, or anything done under their authority, can still turn to his right under the constitution by instituting proceedings in the High Court (with a right of appeal to the Supreme Court) for the enforcement of his right or rights. On the other hand, in Tanzania, where there is no bill of rights, it is quite obvious that grievances founded upon injury inflicted by a presidential or a legislative act, which clearly would fall outside the investigatory ambit of the PCE might go unremedied. So, to the extent that this is the case, the Zambian "doubly-

locked" system of judicial/Ombudsman approach to the protection of individual rights, would seem to rest on a more sounder foundation in adequately fulfilling that task, than the system in Tanzania.

From our discussion above regarding the role which an Ombudsman can play in securing protection of individual liberties, it is fair to conclude that, on its own, the system would yield very little practical results. Its contribution in that respect would be more meaningfully appreciated if the institution is made to function side by side with some other supporting protective devices, such as a bill of rights as is the case in Zambia; and/or if the institution functions in a politically congenial atmosphere, such as is facilitated by the existence of a responsive political leadership to the requirement of the rule of law and of democracy.

This then brings us to a consideration of the role which we envisage the party and the political leadership (especially the President) can usefully play in the protection of human rights, given the constitutional character of African Presidential systems of government.

iii) Role which the Party and the Political Leadership can Usefully Play in the Enforcement of Individual Rights

It will have become clear by now that one of the most distinctive features which African political and constitutional systems display is the dominating role which the President occupies within the entire

government machinery. This is certainly true especially in a one-party state, in which the position of the President is unquestionably more dominating and where his influence over all political activities in the country is, for all practical purposes, self-evident. Parliamentary and judicial activities, and those of the press are all tightly controlled by the executive through the agency of the party. Hence all the traditional avenues of criticisms against the activities and conduct of the government are skilfully blocked. Further, there are no longer independent bodies in the country whose operations are not brought under the umbrella and control of the party - or the President, to be more precise. Appointments, dismissals, and disciplinary measures in the civil service, the parastatal bodies, police and prisons, defence, institutions of higher education, is exercised by the president through the various service commissions established under the Constitution, but whose activities and functions are made subject to the "general direction" of the President, and whose orders (the President's) "shall" be complied with by the commission or person concerned.⁷⁴

But above all, an African President has the muscle to make his country follow a certain pattern of political course of his own personal liking. In fact, most of the major constitutional reforms that have taken place since independence in these countries, including the introduction of one-party states, have been at the ^{instigation}, or acquiescence, of the President concerned. Indeed, an African Presidents' personal commitment to ensuring the success of any institution or the implementation of any government policy, is indispensable. An avowedly determined leadership in the observance and maintenance of the rule of law and of human rights is therefore

essential. And if there can be one valid proposition about human rights in Africa, it is that their protection would not only depend on the mere institutional infrastructure created for that purpose, however perfect these may be, but more critically on what the political leadership think and do about it. The example of Tanzania is very much in point here. We have seen the role which President Julius Nyerere had personally played in ensuring that the one-party constitution which Tanzania was to establish (and which it established in 1965) fundamental principles of democracy such as the rule of law, civil liberties, and the independence of the judiciary "lie at the basis of the Tanganyika Nation, and the whole political, economic and social organization of the State must be directed towards their rapid implementation".⁷⁵ Though the resultant constitutional structure did not incorporate a bill of rights as we have seen, the creation of the PCE and the reference in the preamble calling upon the government to foster the principles that underlie the concept of human rights, reflects more on Nyerere's personal commitment in ensuring that the entire political leadership should submit itself to the requirements of democratic principles in the running of affairs of government. The successful operation of the one-party state institutions in Tanzania is at least a result of, or attributable to, the good statesmanship of the President. The same comments can be made in respect of Zambia, where President Kaunda has consistently maintained the position that "the supremacy of the rule of law and the independence of the judiciary....and the fundamental rights and freedoms of the individual..." are "cardinal inviolable and built-in safeguards" that will always exist under the Zambian Constitution.⁷⁶

Both Nyerere and Kaunda have shown characteristic firmness in dealing with corrupt government officials and those who ignore to execute their official duties in accordance with the established procedures. They have also supported the activities of their respective Ombudsmen. The position in Zambia and Tanzania can be compared to that in Malawi under President Kamuzu Banda, who, to start with, is a life president of his country. Having rejected inclusion of a bill of rights in the Malawian Republican/One-Party State constitution of 1966, there is absolutely no other institution specifically devised to safeguard the rights and freedoms of individuals in a more formal way, as is the case in Zambia and Tanzania. This, coupled with the fact that there is virtually no active personal response or initiative from the President to popularize the idea of a government based on some firm constitutionalist principles, Malawi, like Nkrumah's Ghana (1960-66) is undergoing a crisis in the nature of executive perversion of democratic procedures, which comes dangerously close to dictatorship.

Assuming that there is present a genuine willingness on the part of the President to secure implementation of the principles of democracy, the next important factor is the degree of involvement which the party leadership in general is willing to render in the enforcement of the principles underlying the rule of law. Like the African President, it is because of the dominant position which the party occupies in the political and constitutional systems of many African states (especially those which have adopted one-party states) that makes its role in implementing any vital national objective is essential, if not indispensable. The party in a one-party state like Zambia or Tanzania, is elevated above all institutions in the land. In Zambia,

but not in Tanzania, there is an effective separation both in terms of personnel and functions between the cabinet and the central committee of the party. Members of the central committee take precedence over those of the cabinet. The party makes policy and merely instructs the government functionary concerned to implement it. Therefore, the party, in effect, directs the political destiny of the country. It thus follows from this that the commitment of party leadership to any principles which should guide the government in the execution of its day-to-day tasks is essential. Party leadership which is avowedly committed to the maintenance of the rule of law and to the upholding of human rights may indeed play the vital role in inculcating in the minds of government officials, and the public at large, an awareness that the nation-state is founded upon certain ethical principles which should operate to inform the actions of public officials in their discharge of the many legal powers conferred on them under the statutes. One of the most formidable problems that operate adversely in the effective protection of human rights in Africa, is the fact that the ordinary people themselves are ignorant of their rights under the law, let alone how to go about asserting them when transgressed. Further, the politicians and the public officials too, are not themselves aware of their limits of power, and have behind them no ethic of how to go about handling public affairs bona fide. Thus, the problem would appear to be one of finding a well-organized institution or agency which could be used for the purpose of mobilizing the inert masses by providing them with some basic political education about a variety of important political subjects - of which their civil liberties and how to defend them would obviously be one such subject. The party is particularly well suited to undertake

this task. Its experience in the mobilization of the people during the nationalist struggle for independence; its legitimacy; the support it has among the entire political leadership; its available resources in the form of personnel, money, transport facilities, the media, accessibility to all government officials from the top (i.e., the President) to the messenger or tea boy, and to the chiefs and the ordinary people, both in rural and urban areas. It is thus upon the party that the formidable task of waging a campaign which has behind it the objective of instilling in the minds of the people a sense of ethical commitment about how the process of government should be carried on falls. Political practice in communist countries like Russia and Mao's China shows just how possible mobilization through party machinery can prove effective in achieving or implementing state policies.

Finally, the point must be stressed here that African states have just emerged into nationhood within the last 15 years or so, and as such much of the needed infrastructural conditions needed to bring about stable political and constitutional conditions have yet to be found and consolidated. The present, rather fragile state of affairs in African polities could be looked upon as a transient phase which, with the passage of time, will fade away, to be replaced by more stable conditions. The question, however, is whether Africa is on the right path in the search for these more stable political conditions or solutions to its massive problems of democracy. Does the political practice in Africa and the existing systems of government - such as one-party states, no-party states or military regimes - permit of a prediction of optimism that the "rule of law" will eventually prevail over the propensity to personalize power by

one man or a group of individuals? Perhaps as a matter of formality, one should state that such an era must come, but not least with the qualification that it is bound to take a long time. Ghana was the first African country to attain independence in 1957. In 1960 it became the first African country to adopt a presidential form of government. In 1964 Ghana also gave the lead by adopting a one-party state. Between 1960-66 Ghana under President Nkrumah and the Convention Peoples' Party (the CPP) experienced perhaps the worst form of "tyranny and oppression" in independent Africa. Nkrumah with his CPP government was overthrown by the army. Reverting to civilian rule 3 years later in 1969, the people of Ghana vowed that:

"...with the experience of tyranny and oppression so fresh in the minds of the people of Ghana, Ghanaians were determined to ensure that never again would the political sovereignty of our country be allowed to reside so precariously in one man".⁷⁷

The constitution that resulted from this displayed just that preoccupation, namely, what an observer has called an excessive "...indulgence in legal over-kill, with its fail-safe entrenchment provisions and double-locked guarantees..."⁷⁸ In particular, a bill of rights and the office of an Ombudsman was provided for. Yet this constitution lasted only 3 years - being overthrown by the army in 1972. The people of Ghana at the time of writing are fighting a second battle to return to civilian rule.

And the question cannot be ruled out of possible further military takeovers, or other forms of constitutional breakdown. These problems threaten not only Ghana, but many if not all, African states. Consequently, it would be futile to engage in any exercise

of predicting when stable political and constitutional conditions would prevail in the continent of Africa.

For the reasons that we have given in this investigation, it is difficult to view with any optimism the immediate future or prospects for human rights in many parts of Africa.

NOTES

1. Chapter 2, supra.
2. Chapters 1 and 2, supra.
3. Chapter 3, supra.
4. See Chapter 2 in particular.
5. Act No.30 of 1969.
6. This point is also underlined by Professor S. De Smith, 'Constitutionalism in the Commonwealth Today', Malaya Law Review, Vol.4, No.2, p.205, pp.206-7.
7. See, for example, Denis V. Cowen, 'Human Rights in Contemporary Africa,' Natural Law Forum (1963), 11, pp.5-6.
8. Ibid., p.6.
9. See, for example, claims by appellant in R. v. Chona. Also the point is stressed by James N.C. Paul, 'Some Observations on Constitutionalism, Juridial Review and Rule of Law in Africa', (1974) 35 Ohio State Law Journal, p.820.
10. De Smith, 'Constitutionalism in the Commonwealth Today', op.cit., p.205.
11. The case of the colony of "Rhodesia" is very much in point here.
12. See Nwabueze, Constitutionalism in the Emergent States, pp.219-20.
13. For a somewhat extended discussion of reasons for military coups in Africa, see Nwabueze, ibid., pp.220-27.
14. Sc.58/69 of April 24, 1970 (unreported): discussed by Nwabueze ibid.
15. Quoted by Nwabueze, ibid., pp.246-7.
16. PLD 1958, SC.533.
17. Ibid., pp.538-9.
18. In General Theory of Law and State (1945), pp.111-118.
19. (1966) EA.514.
20. (1969), 1, AC.645 (PC).
21. See Report of the International Commission of Jurists on "Violations of Human Rights and the Rule of Law in Uganda", Geneva, 1974.

22. See the National Commission on the Establishment of a One-Party Participatory Democracy in Zambia, Para. and also the Presidential Commission on the Establishment of a Democratic One-Party State in Tanzania, Para.8, op.cit.
23. See generally Government White Paper of Summary of Recommendations accepted by Government, op.cit., especially recommendations relating to Protection of Fundamental Rights and Freedoms of the Individual and of the Executive, pp.3-7.
24. See Article 75(1) of the One-Party Constitution 1973.
25. Article 75(5), ibid.
26. See Article 77(1) of the 1973 Constitution.
27. Cap.122 of the Laws of Zambia.
28. Article 38(3) of the Constitution 1973.
29. Article 8(4) of UNIP Constitution.
30. See Zambia Daily Mail of 12 October 1978.
31. The instance occurred in Ibingira v. Uganda (1966) EA.306.
32. See, for example, Kachasu v. Attorney-General. This case is discussed in Chapter 5, supra.
33. See Report of the Constitution Drafting Committee, Vol.II, pp.38-9, Federal Ministry of Information, Lagos, 1976.
34. The Constitution of the Islamic Republic of Pakistan, March 1, 1962. See Peaslee, Constitutions of Nations, Vol.II at p.990.
35. Report of the Constitution Drafting Committee, Vol.I, p.vii, Federal Ministry of Information, Lagos, 1976.
36. The Constitution of the Islamic Republic of Pakistan, op.cit.
37. (1951) SCR., p.531. See also Basu's Commentary on the Constitution of India, op.cit., Vol.2, 1965, p.314.
38. AIR 1958, SC.956.
39. Ibid. See also M.P. Jain, Indian Constitutional Law (1962), p.506.
40. AIR 1952, 753. See also Article 47 of the Constitution of India.
41. Bombay v. F.N. Balsara, AIR 1951, SC.318, 229.
42. B.O. Nwabueze, Presidentialism in Commonwealth Africa, op.cit., p.386.

43. See Nwabueze, ibid.
44. Ibid., pp.303-4.
45. See Report of the Presidential Commission on the Establishment of a One-Party State, op.cit., Para.105.
46. Report of the Presidential Commission, op.cit., Para.106.
47. Section 67 of the Interim Constitution, Cap.VI.
48. See Sections 100 and 101 of the 1969 Constitution.
49. Article 117(1) of the Constitution.
50. F.M. Chomba, An Explanation of the Functions of the Commission of Investigation, Government Printer, Lusaka, 1974, p.8.
51. A thorough treatment of the Tanzanian Permanent Commission of Enquiries regarding these matters is to be found in Patrick M. Norton, ICLQ (1973), p.603. As regards the structural, procedural and other matters pertaining to the Zambian Commission, see Robert Martin.
52. Especially Robert Martin, ibid. See also a pamphlet prepared by F.M. Chomba on An Explanation of the Functions of the Commission for Investigation, op.cit.
53. See Article 118(2)(a) of the Constitution.
54. See Article 118(2)(b) and (c) of the Constitution.
55. See Nwabueze, Presidentialism in Commonwealth Africa, op.cit., p.203.
56. Report of the National Commission on the Establishment of a One-Party Participatory Democracy, op.cit., Para.129(6).
57. Article 117(4).
58. Supra, Chapter 9.
59. Report of the Presidential Commission on the Establishment of a Democratic One-Party State in Tanzania, op.cit., Para.106.
60. See Hon. E.A. Mangenya, MP, PCE (Ombudsman) 1970 (Government Printer, Dar-es-Salaam), pp.4-5. Emphasis supplied.
61. (1972) ZLR, 145.
62. See, for example, Lord Denning's, M.R., statement in Secretary of State for Employment v. ASLEF (No.2).
63. (1972) 2 WLR, 1370 p.1390.

64. (1967) ZLR, 145.
65. Per Blagden, C.J., ibid., p.165.
66. See Constitution Amendment Act, No.22 of 1975.
67. Supra, Chapter 9.
68. President Kenneth Kaunda, in the "Watershed" speech, op.cit.
69. Patrick Norton, The Tanzanian Ombudsman, ICLQ (1973), p.604.
70. See Bikas Sanyal, J., case and others (compilers), Higher Education and the Labour Market in Zambia (UNESCO Press, 1976), Ch.III.
71. Report of the National Commission, op.cit., Para.129(6)
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73. Section 9 of the Commission for Investigation, Act.No.23 of 1974.
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APPENDIX I

i) Bill of Rights in Zambia 1964

Chapter III of the Constitution entitled "Protection of Fundamental Rights and Freedoms of the Individual"

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|---|---|
| Fundamental rights and freedoms of the individual | <p>13. Whereas every person in Zambia is entitled to the fundamental rights and freedoms of the individual, that is to say the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely -</p> <ul style="list-style-type: none"> a) life, liberty, security of the person and the protection of the law; b) freedom of conscience, of expression and of assembly and association; and c) protection for the privacy of his home and other property and from deprivation of property without compensation; <p>the provisions of this Chapter shall have the effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.</p> |
| Protection of right to life | <p>14. 1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law in force in Zambia of which he has been convicted.</p> <p>2) Without prejudice to any liability for a contravention of any other law with respect to the use of force in such cases as are hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use of force to such extent as is reasonably justifiable in the circumstances of the case -</p> <ul style="list-style-type: none"> a) for the defence of any person from violence or for the defence of property; b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; c) for the purpose of suppressing a riot, insurrection or mutiny; or d) in order to prevent the commission by that person of a criminal offence; <p>or if he dies as the result of a lawful act of war.</p> |

Protection of
right
to personal
liberty

15. 1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say -
- a) in execution of the sentence or order of a court, whether established for Zambia or some other country, in respect of a criminal offence of which he has been convicted;
 - b) in execution of the order of a court of record punishing him for contempt of that court or of a court inferior to it;
 - c) in execution of the order of a court made to secure the fulfilment of any obligation imposed on him by law;
 - d) for the purpose of bringing him before a court in execution of the order of a court;
 - e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Zambia;
 - f) under the order of a court or with the consent of his parent or guardian, for his education or welfare during any period ending not later than the date when he attains the age of eighteen years;
 - g) for the purpose of preventing the spread of an infectious or contagious disease;
 - h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;
 - i) for the purpose of preventing the unlawful entry of that person into Zambia, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Zambia or for the purpose of restricting that person while he is being conveyed through Zambia in the course of his extradition or removal as a convicted prisoner from one country to another; or
 - j) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Zambia or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during any visit that he is permitted to make to any part of Zambia in which, in consequence of any such order, his presence would otherwise be unlawful.

15. (continued)

2) Any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.

3) Any person who is arrested or detained -

a) for the purpose of bringing him before a court in execution of the order of a court; or

b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Zambia;

and who is not released, shall be brought without undue delay before a court; and if any person arrested or detained as mentioned in paragraph (b) of this subsection is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

4) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that other person.

Protec- 16.
tion
from
slavery
and
forced
labour

1) No person shall be held in slavery or servitude.

2) No person shall be required to perform forced labour.

3) For the purposes of this section, the expression "forced labour" does not include -

a) any labour required in consequence of the sentence or order of a court;

b) labour required of any person while he is lawfully detained that, though not required in consequence of the sentence or order of a court, is reasonably necessary in the interests of hygiene or for the maintenance of the place at which he is detained;

c) any labour required of a member of a disciplined force in pursuance of his duties as such or, in the case of a person who has conscientious objections to service as a member of a naval, military or air force, any labour that that person is required by law to perform in place of such service;

16. (continued)

- d) any labour required during any period when the Republic is at war or a declaration under section 29 of this Constitution is in force or in the event of any other emergency or calamity that threatens the life and well-being of the community, to the extent that the requiring of such labour is reasonably justifiable in the circumstances of any situation arising or existing during that period or as a result of that other emergency or calamity, for the purpose of dealing with that situation; or
- e) any labour reasonably required as part of reasonable and normal communal or other civic obligations.

Protec- 17.
tion
from
inhuman
treat-
ment

- 1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.
- 2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment that was lawful in the former Protectorate of Northern Rhodesia immediately before the coming into operation of this Constitution.

Protec- 18.
tion
from
depri-
vation
of
property

- 1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say -
 - a) the taking of possession or acquisition is necessary or expedient -
 - i) in the interests of defence, public safety, public order, public morality, public health, town and country planning or land settlement; or
 - ii) in order to secure the development or utilisation of that, or other, property for a purpose beneficial to the community; and
 - b) provision is made by a law applicable to that taking of possession or acquisition -
 - i) for the prompt payment of adequate compensation; and
 - ii) securing to any person having an interest in or right over the property a right of access to a court or other authority for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation.

18. (continued)

2) No person who is entitled to compensation under this section shall be prevented from remitting within a reasonable time after he has received any amount of that compensation, the whole of that amount (free from any deduction, charge or tax made or levied in respect of its remission) to any country of his choice outside Zambia.

3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (2) of this section to the extent that the law in question authorises -

- a) the attachment, by order of a court, of any amount of compensation to which a person is entitled in satisfaction of the judgment of a court or pending the determination of civil proceedings to which he is a party; or
- b) the imposition of reasonable restrictions on the manner in which any amount of compensation is to be remitted.

4) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section -

- a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property -
 - i) in satisfaction of any tax, rate or due;
 - ii) by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence under the law in force in Zambia;
 - iii) as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract;
 - iv) in the execution of judgments or orders of a court in proceedings for the determination of civil rights or obligations;
 - v) in circumstances where it is reasonably necessary so to do because the property is in a dangerous state or injurious to the health of human beings, animals or plants;
 - vi) in consequence of any law with respect to the limitation of actions; or
 - vii) for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry or, in the case of land, for the purposes of the carrying out thereon of work of soil conservation or the conservation of other natural resources or work relating to agricultural development or improvement (being work relating to such development or improvement that the owner or occupier of the land has been required, and has without reasonable excuse refused or failed, to carry out);

18. (continued)

- b) to the extent that the law in question makes provision for the taking of possession or acquisition of -
 - i) enemy property;
 - ii) property of a deceased person, a person of unsound mind or a person who has not attained the age of eighteen years, for the purpose of its administration for the benefit of the persons entitled to the beneficial interest therein;
 - iii) property of a person adjudged bankrupt or a body corporate in liquidation, for the purpose of its administration for the benefit of the creditors of the bankrupt or body corporate and, subject thereto, for the benefit of other persons entitled to the beneficial interest in the property; or
 - iv) property subject to a trust, for the purpose of vesting the property in persons appointed as trustees under the instrument creating the trust or by a court or, by order of a court, for the purpose of giving effect to the trust.

5) Nothing in this section shall be construed as affecting the making or operation of any law for the compulsory taking of possession in the public interest of any property, or the compulsory acquisition in the public interest of any interest in or right over property, where that property, interest or right is held by a body corporate established by law for public purposes in which no moneys have been invested other than moneys provided by Parliament.

Protection
for
privacy
of home
and
other
property

- 19. 1) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.
- 2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -
 - a) that is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilisation of mineral resources, or in order to secure the development or utilisation of any property for a purpose beneficial to the community;
 - b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons;

19. (continued)

- c) that authorises an officer or agent of the Government, a local government authority or a body corporate established by law for a public purpose to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to that Government, authority or body corporate, as the case may be; or
- d) that authorises, for the purpose of enforcing the judgment or order of a court in any civil proceedings, the search of any person or property by order of a court or entry upon any premises by such order;

and except so far as that provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

Provisions
to
secure
protection of
law

- 20. 1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
- 2) Every person who is charged with a criminal offence-
 - a) shall be presumed to be innocent until he is proved or has pleaded guilty;
 - b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged;
 - c) shall be given adequate time and facilities for the preparation of his defence;
 - d) shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice;
 - e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and
 - f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge;

20. (continued)

and except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.

3) When a person is tried for any criminal offence, the accused person or any person authorised by him in that behalf shall, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, be given within a reasonable time after judgment a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court.

4) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.

5) No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, save upon the order of a superior court in the court of appeal or review proceedings relating to the conviction or acquittal.

6) No person shall be tried for a criminal offence if he shows that he has been pardoned for that offence.

7) No person who is tried for a criminal offence shall be compelled to give evidence at the trial.

8) No person shall be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law:

Provided that nothing in this subsection shall prevent a court of record from punishing any person for contempt of itself notwithstanding that the act or omission constituting the contempt is not defined in a written law and the penalty therefor is not so prescribed.

20. (continued)

10) Except with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public.

11) Nothing in the last foregoing subsection shall prevent the court or other adjudicating authority from excluding from the proceedings persons other than the parties thereto and their legal representatives to such extent as the court or other authority -

- a) may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice or in interlocutory proceedings; or
- b) may be empowered by law to do so in the interests of defence, public safety, public order, public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings.

12) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of -

- a) subsection (2)(a) of this section to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts;
- b) subsection (2)(d) of this section to the extent that the law in question prohibits legal representation before a subordinate court in proceedings for an offence under African customary law (being proceedings against any person who, under that law, is subject to that law);
- c) subsection (2)(e) of this section to the extent that the law in question imposes reasonable conditions that must be satisfied if witnesses called to testify on behalf of an accused person are to be paid their expenses out of public funds;
- d) subsection (2) of this section to the extent that the law provides that -
 - i) where the trial of any person for any offence prescribed by or under the law has been adjourned and the accused, having pleaded to the charge, fails to appear at the time fixed by the court for the resumption of his trial after the adjournment, the proceedings may continue notwithstanding the absence of the accused if the court, being satisfied that, having regard to all the circumstances of the case, it is reasonable so to do, so orders; and

20. (continued)

- ii) the court shall set aside any conviction or sentence pronounced in the absence of the accused in respect of that offence if the accused satisfies the court without undue delay that the cause of his absence was reasonable and that he had a valid defence to the charge;
- e) subsection (2) of this section to the extent that the law provides that the trial of a body corporate may take place in the absence of any representative of the body corporate upon a charge in respect of which a plea of not guilty has been entered by the court;
- f) subsection (5) of this section to the extent that the law in question authorises a court to try a member of a disciplined force for a criminal offence notwithstanding any trial and conviction or acquittal of that member under the disciplinary law of that force, so, however, that any court so trying such a member and convicting him shall in sentencing him to any punishment take into account any punishment awarded him under that disciplinary law.

13) In the case of any person who is held in lawful detention, the provisions of subsection (1), subsection (2)(d) and (e) and subsection (3) of this section shall not apply in relation to his trial for a criminal offence under the law regulating the discipline of persons held in such detention.

14) In its application to a body corporate subsection (2) of this section shall have effect as if the words "in person or" were omitted from paragraphs (d) and (e).

15) In this section "criminal offence" means a criminal offence under the law in force in Zambia.

Protec- 21.
of free-
dom of
con-
science

1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.

2) Except with his own consent (or, if he is a minor, the consent of his guardian) no person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if that instruction, ceremony or observance relates to a religion other than his own.

21. (continued)

3) No religious community or denomination shall be prevented from providing religious instruction for persons of that community or denomination in the course of any education provided by that community or denomination.

4) No person shall be compelled to take any oath which is contrary to his religion or belief or to take any oath in a manner which is contrary to his religion or belief.

5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision which is reasonably required -

- a) in the interests of defence, public safety, public order, public morality or public health; or
- b) for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practise any religion without the unsolicited intervention of members of any other religion;

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

Protec- 22.
tion of
freedom
of
expression

1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

- a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; or
- b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the court, regulating educational institutions in the interests of persons receiving instruction therein, or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless, broadcasting or television; or

22. (continued)

c) that imposes restrictions upon public officers;
and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

Protec-
tion of
freedom
of
assembly
and
associa-
tion

23. 1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests.

2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

- a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;
- b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons;
- c) that imposes restrictions upon public officers; or
- d) for the registration of trade unions in a register established by or under a law and for imposing reasonable conditions relating to the procedure for entry on such a register (including conditions as to the minimum number of persons necessary to constitute a trade union qualified for registration);

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

Protec-
tion of
freedom
of
movement

24. 1) No person shall be deprived of his freedom of movement, and for the purposes of this section the said freedom means the right to move freely throughout Zambia, the right to reside in any part of Zambia, the right to enter Zambia and immunity from expulsion from Zambia.

2) Any restriction on a person's freedom of movement that is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this section.

3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

24. (continued)

- a) for the imposition of restrictions that are reasonably required in the interests of defence, public safety, public order, public morality, or public health or the imposition of restrictions on the acquisition or use by any person of land or other property in Zambia, and except so far as that provision or, as the case may be, the thing done under the authority thereof, is shown not to be reasonably justifiable in a democratic society;
- b) for the imposition of restrictions on the freedom of movement of any person who is not a citizen of Zambia;
- c) for the imposition of restrictions upon the movement or residence within Zambia of public officers; or
- d) for the removal of a person from Zambia to be tried outside Zambia for a criminal offence or to undergo imprisonment in some other country in execution of the sentence of a court in respect of a criminal offence under the law in force in Zambia of which he has been convicted.

4) If any person whose freedom of movement has been restricted by virtue of such a provision as is referred to in subsection (3)(a) of this section so requests at any time during the period of that restriction not earlier than six months after the order was made or six months after he last made such request, as the case may be, his case shall be reviewed by an independent and impartial tribunal presided over by a person, qualified to be enrolled as an advocate in Zambia, appointed by the Chief Justice:

Provided that a person whose freedom of movement has been restricted by virtue of a restriction which is applicable to persons generally or to general classes of persons shall not make a request under this subsection unless he has first obtained the consent of the High Court.

5) On any review by a tribunal in pursuance of this section of the case of a person whose freedom of movement has been restricted, the tribunal may make recommendations, concerning the necessity or expediency of continuing the restriction to the authority by which it was ordered but, unless it is otherwise provided by law, that authority shall not be obliged to act in accordance with any such recommendations.

Protection from discrimination on the grounds of race, etc.

25. 1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.
- 2) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.
- 3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
- 4) Subsection (1) of this section shall not apply to any law so far as that law makes provision -
 - a) for the appropriation of the general revenues of the Republic;
 - b) with respect to persons who are not citizens of Zambia;
 - c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;
 - d) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons; or
 - e) whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.
- 5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that it makes reasonable provision with respect to qualifications for service as public officer or as a member of a disciplined force or for the service of a local government authority or a body corporate established directly by any law.

25. (continued)

- 6) Subsection (2) of this section shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in subsection (4) or (5) of this section.
- 7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any restriction on the rights and freedoms guaranteed by sections 19, 21, 22, 23 and 24 of this Constitution, being such a restriction as is authorised by section 19(2), 21(5), 22(2), 23(2) or 24(3), as the case may be.
- 8) Nothing in subsection (2) of this section shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law.
- 9) Nothing contained in or done under the authority of any law shall be held to be inconsistent with the provisions of this section -
 - a) if that law was in force immediately before the coming into operation of this Constitution and has continued in force at all times since the coming into operation of this Constitution; or
 - b) to the extent that the law repeals and re-enacts any provision which has been contained in any enactment at all times since immediately before the coming into operation of this Constitution.

Dero-
gation
from
funda-
mental
rights
and
freedoms

- 26. 1) Nothing contained in or done under the authority of an Act of Parliament shall be held to be inconsistent with or in contravention of section 15 or 25 of this Constitution to the extent that the Act authorises the taking, during any period when the Republic is at war or any period when a declaration under section 29 of this Constitution is in force, of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during that period.
- 2) Where a person is detained by virtue of such an authorisation as is referred to in subsection (1) of this section the following provisions shall apply:
 - a) he shall, as soon as reasonably practicable and in any case not more than five days after the commencement of his detention, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is detained;

26. (continued)

- b) not more than fourteen days after the commencement of his detention, a notification shall be published in the Gazette stating that he has been detained and giving particulars of the provision of law under which his detention is authorised;
 - c) not more than one month after the commencement of his detention and thereafter during his detention at intervals of not more than six months, his case shall be reviewed by an independent and impartial tribunal established by law and presided over by a person appointed by the Chief Justice;
 - d) he shall be afforded reasonable facilities to consult a legal representative of his own choice who shall be permitted to make representations to the tribunal appointed for the review of the case of the detained person;
 - e) at the hearing of his case by the tribunal appointed for the review of his case he shall be permitted to appear in person or by a legal representative of his own choice.
- 3) On any review by a tribunal in pursuance of this section of the case of a detained person, the tribunal may make recommendations, concerning the necessity or expediency of continuing his detention, to the authority by which it was ordered but, unless it is otherwise provided by law, that authority shall not be obliged to act in accordance with any such recommendations.
- 4) Nothing contained in subsection (2)(d) or (2)(e) of this section shall be construed as entitling a person to legal representation at the public expense.

Refer-
ence of
certain
matters
to
special
tribunal

27. 1) Whenever -
- a) a request is made in accordance with subsection (2) of this section for a report on a bill or a statutory instrument; or
 - b) the Chief Justice considers it necessary for the purpose of determining claims for legal aid in respect of proceedings under section 28 of this Constitution;

the Chief Justice shall appoint a tribunal which shall consist of two persons selected by him from amongst persons who hold or have held the office of a judge of the High Court.

27. (continued)

2) A request for a report on a bill or a statutory instrument may be made by no less than seven members of the National Assembly by notice in writing delivered -

- a) in the case of a bill, to the Speaker within three days after the final reading of the bill in the Assembly;
- b) in the case of a statutory instrument, to the authority having power to make the instrument within fourteen days of the publication of the instrument in the Gazette.

3) Where a tribunal is appointed under this section for the purposes of reporting on a bill or a statutory instrument, the tribunal shall, within the prescribed period, submit a report to the President and to the Speaker of the National Assembly stating -

- a) in the case of a bill, whether or not in the opinion of the tribunal any, and if so which, provisions of the bill would, if enacted, be inconsistent with this Chapter of this Constitution;
- b) in the case of a statutory instrument, whether or not in the opinion of the tribunal any, and if so which, provisions of the instrument are inconsistent with this Chapter of this Constitution;

and, if the tribunal reports that any provision would be or is inconsistent with this Chapter of this Constitution, the grounds upon which the tribunal has reached that conclusion:

Provided that if the tribunal considers that the request for a report on a bill or statutory instrument is merely frivolous or vexatious, it may so report to the President without entering further upon the question whether the bill or statutory instrument would be or is inconsistent with this Chapter of this Constitution.

4) Where a tribunal is appointed under this section for the purpose of determining claims for legal aid, the tribunal may grant to any person who satisfied them that -

- a) he intends to bring or is an applicant in proceedings under section 28(1) or 28(4) of this Constitution;
- b) he has reasonable grounds for bringing the application; and
- c) he cannot afford to pay for the cost of the application;

27. (continued)

a certificate that the application is a proper case to be determined at the public expense:

Provided that paragraph (c) of this subsection shall not apply in any case where the application relates to the validity of a provision of law in respect of which a tribunal has reported that it would be or is inconsistent with this Chapter of this Constitution or where it appears to the tribunal that issues are or will be raised in the application which are of general public importance.

- 5) Where a certificate is granted to any person by a tribunal in pursuance of subsection (4) of this section there shall be paid to that person out of the general revenues of the Republic such amount as the court by which the application is heard may assess as the costs reasonably incurred by that person in connexion with the application; and the sums required for making such payment shall be a charge on the general revenues of the Republic.
- 6) For the purposes of subsection (5) of this section -
 - a) the costs incurred in an application shall include the cost of obtaining the advice of a legal representative and, if necessary, the cost of representation by a legal representative in any court in steps preliminary or incidental to the application;
 - b) in assessing the costs reasonably incurred by a person in an application regard shall be had to costs awarded against that person or recovered by him in those proceedings.
- 7) In this section "prescribed period" means -
 - a) in relation to a bill the period commencing from the appointment of the tribunal to report upon the bill and ending thirty days thereafter or if the Speaker, on the application of the tribunal, considers that owing to the length or complexity of the bill thirty days is insufficient for consideration of the bill, ending on such later day as the Speaker may determine;
 - b) in relation to a statutory instrument the period of forty days commencing from the publication of the instrument in the Gazette.

27. (continued)

8) Nothing in subsection (1), (2) or (3) of this section shall apply to a bill for the appropriation of the general revenues of the Republic or a bill containing only proposals for expressly altering this Constitution or the Order to which this Constitution is scheduled.

9) References in this section to a statutory instrument are references to a statutory instrument made after the coming into operation of this Constitution under the authority of any Act of Parliament or any law enacted by any legislature established for the former Protectorate of Northern Rhodesia, or under the authority of any Act of the Parliament of the United Kingdom or any Order of Her Majesty in Council having effect as part of the law of Zambia.

Enforce- 28.
ment of
protect-
ive pro-
visions

1) Subject to the provisions of subsection (6) of this section, if any person alleges that any of the provisions of sections 13 to 26 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.

2) The High Court shall have original jurisdiction -

- a) to hear and determine any application made by any person in pursuance of subsection (1) of this section;
- b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section;

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 13 to 26 (inclusive) of this Constitution.

3) If in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of sections 13 to 25 (inclusive) of this Constitution, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious.

28. (continued)

4) Any person aggrieved by any determination of the High Court under this section may appeal therefrom to the Court of Appeal:

Provided that no appeal shall lie from a determination of the High Court under this section dismissing an application on the ground that it is frivolous or vexatious.

5) No application shall be brought under subsection (1) of this section on the grounds that the provisions of sections 13 to 26 (inclusive) of this Constitution are likely to be contravened by reason of proposals contained in any bill which, at the date of the application, has not become a law.

6) Parliament may confer upon the Court of Appeal or the High Court such powers in addition to those conferred by this section as may appear to be necessary or desirable for the purpose of enabling that court more effectively to exercise the jurisdiction conferred upon it by this section.

7) Rules of court making provision with respect to the practice and procedure of the High Court for the purpose of this section may be made by the person or authority for the time being having power to make rules of court with respect to the practice and procedure of that court generally.

Declarations
relating
to
emergencies
or
threatened
emergencies

29. 1) The President may, at any time, by Proclamation published in the Gazette, declare that -
- a) a state of public emergency exists; or
 - b) a situation exists which, if it is allowed to continue, may lead to a state of public emergency.
- 2) A declaration under subsection (1) of this section, if not sooner revoked, shall cease to have effect -
- a) in the case of a declaration made when Parliament is sitting or has been summoned to meet within five days, at the expiration of a period of five days beginning with the date of publication of the declaration;
 - b) in any other case, at the expiration of a period of twenty-one days beginning with the date of publication of the declaration;

unless, before the expiration of that period, it is approved by a resolution passed by the National Assembly.

29. (continued)

3) Subject to the provisions of subsection (4) of this section, a declaration approved by resolution of the National Assembly under subsection (2) of this section shall continue in force until the expiration of a period of six months beginning with the date of its being so approved or until such earlier date as may be specified in the resolution:

Provided that the National Assembly may, by resolution extend its approval of the declaration for periods of not more than six months at a time.

4) The National Assembly may, by resolution at any time revoke a declaration approved by the Assembly under this section.

APPENDIX II

Some Relevant Amendments Enacted to the Bill of Rights, 1964-1973

- a) Constitution (Amendment) (No.5) of 1969
- b) Constitution (Amendment) (No.5) of 1972.
- c) Societies (Amendment) No.9 of 1974

APPENDIX II

- a) An Act to amend the Zambia Independence Order, 1964, and the Constitution. (23rd October, 1969.)

Enact- ENACTED by the Parliament of Zambia
ment

Short 1. This Act may be cited as the Constitution (Amendment)
title (No.5) Act, 1969.

Amend- 2. Section twenty of the Zambia Independence Order, 1964,
ment is amended by the insertion after subsection (2)
of thereof of the following new subsection:
section (3) This section shall not apply to the Barotseland
20 of the Agreement, 1964 (that is to say, the agreement dated
Zambia 18th May, 1964, between the Government of Northern
Indepen- Rhodesia and the Litunga of Barotseland which provides
dence that it may be cited by that title), which agreement
Order, shall, on and after the commencement of the Constitution
1964 (Amendment) (No.5) Act, 1969, cease to have effect, and
all rights (whether vested or otherwise), liabilities
and obligations thereunder shall thereupon lapse.

Repeal 3. Section ten of the Constitution is repealed.
of
section 10
of the
Consti-
tution

Repeal 4. Section eighteen of the Constitution is repealed and
and rep- and the following section substituted therefor:
lacement
of (18) (1) Save as hereinafter provided, no property of
section 18 any description shall be compulsorily taken possession
of the of, and no interest in or right over property of any
Consti- description shall be compulsorily acquired, except under
tution the authority of an Act of Parliament which provides for
payment of compensation for the property or interest or
right to be taken possession of or acquired.

(2) Nothing contained in or done under the authority
of any law shall be held to be inconsistent with or in
contravention of subsection (1) of this section to the
extent that such law provides for the taking possession
or acquisition of any property or interest therein or
right thereover -

- (a) in satisfaction of any tax, rate or due;
- (b) by way of penalty for breach of any law,
whether under civil process or after
conviction of an offence;
- (c) in execution of judgments or orders of courts;

- (d) upon the attempted removal of the property in question out of or into Zambia in contravention of any law;
- (e) as an incident of a contract (including a lease, tenancy, mortgage, charge, pledge or bill of sale) or of a title deed to land;
- (f) for the purpose of its administration, care or custody on behalf of and for the benefit of the person entitled to the beneficial interest therein;
- (g) by way of the vesting of enemy property or for the purpose of the administration of such property;
- (h) for the purpose of -
 - (i) the administration of the property of a deceased person, a person of unsound mind or a person who has not attained the age of eighteen years, for the benefit of the persons entitled to the beneficial interest therein;
 - (ii) the administration of the property of a person adjudged bankrupt or a body corporate in liquidation, for the benefit of the creditors of such bankrupt or body corporate and, subject thereto, for the benefit of other persons entitled to the beneficial interest in the property;
 - (iii) the administration of the property of a person who has entered into a deed of arrangement for the benefit of his creditors; or
 - (iv) vesting any property subject to a trust in persons appointed as trustees under the instrument creating the trust or by a court or, by order of a court, for the purpose of giving effect to the trust;
- (i) in consequence of any law relating to the limitation of actions;
- (j) in terms of any law relating to abandoned, unoccupied, unutilised or undeveloped land, as defined in such law;
- (k) in terms of any law relating to absent or non-resident owners, as defined in such law, of any property;
- (l) in terms of any law relating to trusts or settlements;
- (m) by reason of the property in question being in a dangerous state or prejudicial to the health or safety of human beings, animals or plants;
- (n) as a condition in connection with the granting of permission for the utilisation of that or other property in any particular manner;
- (o) for the purpose of or in connection with the prospecting for or exploitation of minerals belonging to the Republic on terms which provide for the respective interests of the persons affected;

- (p) in pursuance of provision for the marketing of property of that description in the common interests of the various persons otherwise entitled to dispose of that property;
 - (q) by way of the taking of a sample for the purposes of any law;
 - (r) by way of the acquisition of the shares, or a class of shares, in a body corporate on terms agreed to by the holders of not less than nine-tenths in value of those shares or that class thereof;
 - (s) where the property consists of an animal, upon its being found trespassing or straying;
 - (t) for so long as may be necessary for the purpose of any examination, investigation, trial or inquiry or, in the case of land, the carrying out thereon -
 - (i) of work for the purpose of the conservation of natural resources of any description; or
 - (ii) of agricultural development or improvement which the owner or occupier of the land has been required, and has without reasonable and lawful excuse refused or failed, to carry out;
 - (u) where the property consists of any licence or permit;
 - (v) where the property consists of wild animals existing in their natural habitat or the carcasses or trophies of wild animals;
 - (w) where the property is held by a body corporate established by law for public purposes and in which no moneys have been invested other than moneys provided by Parliament;
 - (x) where the property is any mineral, mineral oil or natural gases or of any rights accruing by virtue of any title or licence for the purpose of searching for or mining any mineral, mineral oil or natural gases -
 - (i) upon failure to comply with any provision of such law relating to the title or licence or to the exercise of the rights accruing or to the development or exploitation of any mineral, mineral oil or natural gases; or
 - (ii) in terms of any law vesting any such property or rights in the President.
- (3) An Act of Parliament such as is referred to in subsection (1) of this section shall, inter alia -
- (i) provide that compensation shall be paid in money
 - (ii) specify the principles on which the compensation is to be determined; and
 - (iii) provide that the amount of the compensation shall in default of agreement be determined by resolution of the National Assembly.

(4) No compensation determined by the National Assembly in terms of any such law as is referred to in subsections (1) and (3) of this section shall be called in question in any court on the grounds that such compensation is not adequate.

(5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that such law makes provision for the termination of the Barotseland Agreement, 1964 (that is to say, the agreement dated 18th May, 1964, between the Government of Northern Rhodesia and the Litunga of Barotseland which provides that it may be cited by that title) and the lapse of rights (whether vested or otherwise), liabilities and obligations thereunder.

Amend-
ment of
section 24
of the
Consti-
tution

5. Section twenty-four of the Constitution is amended by the deletion of subsections (4) and (5)

Repeal
and
replace-
ment
of
section 26
of the
Consti-
tution

6. Section twenty-six of the Constitution is repealed and the following section substituted therefor;

Deroga-
tion from
funda-
mental
rights
and
free-
doms

26. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of section 15, 18, 19, 21, 22, 23, 24 or 25 of this Constitution to the extent that the law in question authorises the taking, during any period when the Republic is at war or when a declaration under section 29 of this Constitution is in force, of measures for the purpose of dealing with any situation existing or arising during that period; and nothing done by any person under the authority of any such law shall be held to be in contravention of any of the said provisions unless it is shown that the measures taken exceeded anything which, having due regard to the circumstances prevailing at the time, could reasonably have been thought to be required for the purpose of dealing with the situation in question.

Insertion of
new
section
after
section 26
of the
Constitution

Provisions
relating
to
restriction
and
detention

7. The Constitution is amended by the insertion after section twenty-six of the following new section:

- 26A. (1) Where a person's freedom of movement is restricted, or he is detained, under the authority of any such law as is referred to in section 24 or 26 of this Constitution as the case may be the following provisions shall apply:
- (a) he shall, as soon as is reasonably practicable and in any case not more than fourteen days after the commencement of his detention or restriction, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is restricted or detained;
 - (b) not more than one month from the commencement of his restriction or detention a notification shall be published in the Gazette stating that he has been restricted or detained and giving particulars of the provision of law under which his restriction or detention is authorised;
 - (c) if he so requests at any time during the period of such restriction or detention not earlier than one year after the commencement thereof or after he last made such a request during that period, as the case may be, his case shall be reviewed by an independent impartial tribunal established by law and presided over by a person, appointed by the Chief Justice, who is or is qualified to be a judge of the High Court;
 - (d) he shall be afforded reasonable facilities to consult a legal representative of his own choice who shall be permitted to make representations to the authority by which the restriction or detention was ordered or to any tribunal established for the review of his case;
 - (e) at the hearing of his case by such tribunal he shall be permitted to appear in person or by a legal representative of his own choice.

(2) On any review by a tribunal in pursuance of this section of the case of a restricted or detained person, the tribunal may make recommendations to the authority by which it was ordered concerning the necessity or expediency of continuing his restriction or detention but, unless it is otherwise provided by law, that authority shall not be obliged to act in accordance with any such recommendations.

(3) Nothing contained in subsection (1)(d) or (1)(e) of this section shall be construed as entitling a person to legal representation at the public expense.

(4) Parliament may make or provide for the making of rules to regulate the proceedings of any such tribunal including, but without ~~derogating~~ ^{departing} from the generality of the foregoing, rules as to evidence and the admissibility thereof, the receipt of evidence (including written reports) in the absence of the restricted or detained person and his legal representative, and the exclusion of the public from the whole or any portion of the proceedings.

(5) Subsections (10) and (11) of section 20 of this Constitution shall be read and construed subject to the provisions of this section.

Repeal
and
replace-
ment
of
section 29
of the
Consti-
tution

8. (1) Section twenty-nine of the Constitution is repealed and the following section substituted therefor:

Decla-
rations
relating
to emer-
gencies
or threa-
tened
emergen-
cies

29. (1) The President may at any time by Proclamation published in the Gazette declare that -

- (a) a state of public emergency exists; or
- (b) a situation exists which, if it is allowed to continue, may lead to a state of public emergency.

- (2) (i) A declaration made under this section shall cease to have effect on the expiration of a period of twenty-eight days commencing with the day on which the declaration is made unless before the expiration of such period it has been approved by a resolution of the National Assembly.
- (ii) In reckoning any period of twenty-eight days for the purposes of this subsection no account shall be taken of any time during which Parliament is dissolved.

(3) A declaration made under this section may at any time before it has been approved by a resolution of the National Assembly be revoked by the President by a Proclamation published in the Gazette.

(4) A declaration made under this section and approved by a resolution of the National Assembly in terms of subsection (2) of this section may at any time be revoked by a resolution of such Assembly supported by a majority of all the members thereof.

(5) Whenever an election to the office of President results in a change in the holder of that office any declaration made under this section and in force immediately before the day on which the President assumes office shall cease to have effect on the expiration of seven days commencing with this day.

(6) The expiry or revocation of any declaration made under this section shall not affect the validity of anything previously done under such declaration

(2) Any declaration under section twenty-nine of the Constitution in force immediately before the commencement of this Act shall continue in force and shall be deemed to be a declaration, approved by a resolution of the National Assembly in terms of subsection (2) thereof, under the section hereby substituted.

Amend- 10. Section sixty-two of the Constitution is amended in
ment of subsection (1) -
section 62 (i) at the end of paragraph (c), by the deletion of "or";
of the (ii) at the end of paragraph (d), by the deletion of the
Consti- full-stop and the substitution therefor of "; or";
tution (iii) by the addition of paragraph (d) of the following new
paragraph:
(e) whose freedom of movement is restricted, or who is
detained, under the authority of any such law as is
referred to in section 24 or section 26 of this
Constitution as the case may be.

Amend- 11. Section sixty-five of the Constitution is amended in
ment of subsection (2) -
section 65 (i) at the end of paragraph (d), by the deletion of "or";
of the (ii) at the end of paragraph (e), by the deletion of the
Consti- full-stop and the substitution therefor of "; or";
tution (iii) by the addition after paragraph (e) of the following
new paragraph:
(f) if under the authority of any such law as is
referred to in section 24 or section 26 of this
Constitution -
(i) his freedom of movement has been restricted
or he has been detained for a continuous
period exceeding six months; or
(ii) his freedom of movement has been restricted
and he has immediately thereafter been
detained for periods totalling more than
six months; or

- (iii) he has been detained and immediately thereafter his freedom of movement has been restricted for period totalling more than six months.

Amend-
ment of
section 99
of the
Consti-
tution

12. Section ninety-nine of the Constitution is amended -

- (i) by the deletion of subsection (3) and the substitution therefor of the following subsection:

- (3) (a) Subject to the provisions of subsection (8) of this section, a person shall not be qualified for appointment as a Justice of Appeal or a judge of the High Court unless -
 - (i) he holds or has held high judicial office; or
 - (ii) he holds one of the specified qualifications and has held one or other of those qualifications for a total period of not less than five years.

- (b) In this section "the specified qualifications" means the professional qualifications specified in the Legal Practitioners Ordinance or in any law amending or replacing that Ordinance, one of which must be held by any person before he may apply under that Ordinance or under any such law to be admitted as a barrister and solicitor in the Republic.

- (ii) by the addition after subsection (7) of the following new subsection:

- (8) (a) Where the Judicial Service Commission is satisfied that by reason of special circumstances a person who holds one of the specified qualifications is worthy, capable and suitable to be appointed as a Justice of Appeal or a judge of the High Court notwithstanding that he has not held some one or other of those qualifications for a total period of not less than five years, the President, acting in accordance with the advice of the Judicial Service Commission, may dispense with the requirement that such person shall have held some one or other of the specified qualifications for a total period of not less than five years and may appoint him a Justice of Appeal or a judge of the High Court.

- (b) For the purposes of this section "a person qualified for appointment" as a Justice of Appeal or a judge of the High Court as the case may be includes such a person as is referred to in paragraph (a) of this subsection.

APPENDIX II

b) An Act to amend the Constitution (15th December, 1972)

Enact- ENACTED by the Parliament of Zambia
ment

Short 1. This Act may be cited as the Constitution (Amendment)
title (No.5) Act, 1972, and shall be read as one with the
App.1 Constitution.

Insert- 2. The Constitution is amended by the insertion after
tion Chapter II of the following new Chapter:

of new
chapter
IIA in
the
Consti-
tution

CHAPTER IIA
CHAPTER IIA

ONE POLITICAL PARTY

One
polit-
ical
party

12A. (1) There shall be one and only one political
party in Zambia, namely, the United National
Independence Party (in this Constitution
referred to as "the Party").

(2) Every citizen who complies with the requirements
laid down, from time to time, by the constitution
of the Party shall be entitled to become a
member of the Party.

(3) Nothing contained in this Constitution shall be
so construed as to entitle any person to
lawfully form or attempt to form any political
party or organisation other than the Party or
to belong to or assemble, associate, express
opinion or do any other thing in sympathy with
such political party or organisation

APPENDIX II

c) An Act to amend the Societies Act (1st April 1974)

Enact- ENACTED by the Parliament of Zambia.
ment

Short 1. This Act may be cited as the Societies (Amendment) Act,
title 1974, and shall be read as one with the Societies Act,
Cap.105 hereinafter referred to as the principal Act.

Insert- 3. Part IV of the principal Act is amended by the insertion
tion under the heading "UNLAWFUL SOCIETIES" of the following
of new new section:
section 2

Politi- 22A. Every society (other than the United National
cal Independence Party) which is a political party
parties or has for its objects or purposes political activity
and organ- of any kind or assembling, associating, expressing
isations opinion or doing any thing in sympathy with any
to be un- political party or organisation other than the United
lawful National Independence Party shall be an unlawful
societies society.